SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 559

GENERAL BAKING COMPANY, PETITIONER,

vs.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEPTEMBER TERM, 1931

No. 6783

GENERAL BAKING COMPANY

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge

Conlen, LaBrum & Beechwood.
C. S. Wesley.

DOCKET ENTRIES

Nov. 12, 1931. Bill of Complaint filed.

Nov. 12, 1931. Motion for preliminary injunction filed.

Nov. 12, 1931. Subpœna exit—returnable December 2, 1931.

Nov. 12, 1931. Opinion, Dickinson, J., sur motion for preliminary injunction filed.

Nov. 16, 1931. Subpœna returned: "service accepted" and instruction to enter appearance of C. S. Wesley, Esq., for defendants endorsed thereon, and filed.

Apr. 25, 1932. Stipulation of counsel that leave be granted plaintiff to file amended bill of complaint and [fol. 2] Decree granting leave to file Amended Bill of Complaint filed.

Apr. 25, 1932. Amended Bill of Complaint filed.

Apr. 27, 1932. Printed Copy of Amended Bill of Complaint, filed.

May 7, 1932. Answer to Amended bill of Complaint, filed.

May 9, 1932. Præcipe to place case on argument list, filed.

May 13, 1932. Printed copy of answer to amended bill of complaint, filed.

June 21, 1932. Argued sur P. & P.

Oct. 11, 1932. Opinion, Kirkpatrick, J. dismissing Bill, with costs, filed.

Nov. 30, 1932. Petition for leave to file amended answer to amended bill of complaint, filed.

Nov. 30, 1932. Answer to petition for leave to file amended answer, filed.

Nov. 30, 1932. Decree granting leave to amend amended bill of complaint, to file answer to amended bill of complaint within 15 days after service of amended bill of complaint as amended and assigning case for reargument, filed.

Dec. 6, 1932. Amended bill of complaint as amended, filed.

Dec. 29, 1932. Answer to amended bill of complaint, as amended, filed.

Mar. 20, 1933. Plaintiff's requests for findings of fact and conclusions of law, filed.

[fol. 3] June 8, 1933. Opinion, Kirkpatrick, J. reaffirming order for dismissal of Bill of Complaint, filed.

June 14, 1933. Decree dismissing Bill of Complaint, costs to be paid by plaintiff, filed.

Sept. 5, 1933. Assignments of Error, filed.

Sept. 8, 1933. Petition for Appeal, filed.

Sept. 8, 1933. Decree allowing appeal, filed.

Sept. 11, 1933. Bond Sur appeal with Fidelity and Casualty Company of Maryland, surety in $250 and Decree approving same, filed.

Sept. 11, 1933. Citation allowed and issued.

Oct. 6, 1933. Citation returned—service accepted and filed.

Oct. 7, 1933. Præcipe for transcript of record sur appeal, filed.

[fol. 4] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER TERM, 1931

In Equity. No. 6783

GENERAL BAKING COMPANY, a Corporation,

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, a Corporation, and John J. Sullivan, Special Deputy in Charge

AMENDED BILL OF COMPLAINT—Filed April 25, 1932

To the Honorable, the Judges of the said Court:

Your orator complains and says:

1. Your orator is the General Baking Company, a corporation organized and existing under the laws of the State of New York, with principal offices and place of business in New York City, New York, and at the times hereinafter mentioned, sold and distributed bread, cakes, and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania.

2. The defendants are William D. Gordon, Secretary of the Department of Banking for the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy, who, at the close of the business day of October 5, 1931, closed and took [fol. 5] possession and control of the business and property of the Franklin Trust Company, a corporation engaged in banking and organized under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania.

3. The amount in controversy herein is in excess of three thousand dollars ($3,000), exclusive of interest and costs, and the parties involved are citizens of different States of the United States.

4. In June of 1925, the Franklin Trust Company sought to enter into an agreement with your orator for the purposes and under the terms and conditions as are hereinafter averred in paragraph 8 hereof.

5. On or about June 13, 1925, your orator received a letter from the Franklin Trust Company, dated June 12, 1925, which stated, inter alia:

"We will agree to collect deposits from your various Philadelphia plants, and deliver weekly payrolls to these branches in either bulk or individual envelopes,—this to be optional with you,—on days and at times you may elect. We hope, however, that you will arrange for payroll delivery and deposit collection to be made simultaneously wherever possible.

"It is our understanding that you have, or contemplate opening, branches in the following places:

"Norristown, Trenton, Ocean City, Burlington, Atlantic City, Princeton, Wildwood, Pleasantville, Clementon, Wilmington, Berlin, Chester, Camden, Vineland, Millville, Bridgeton, Sea Isle City.

[fol. 6] "We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above list that you include in this district.

"In the event that the above plan is acceptable to you, the minor details, such as mailing duplicate deposit tickets etc., will all be arranged in accordance with your wishes.

"In consideration of the above it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum."

A copy of said letter is attached hereto, marked "Exhibit A," and made a part hereof.

6. On or about August 20, 1925, your orator sent a letter to the Franklin Trust Company, stating, inter alia:

"While I have outlined to Mr. Vance the operation of the accounts to be maintained with you I will confirm it herewith: You are to maintain one account for each of our three branches or a total of three accounts to be known as "General Baking Company Disbursement Account." You are to operate and maintain one account for each of our

three branches or a total of three accounts to be known as "General Baking Company Deposit Account". The official designation of the accounts will be for instance: General Baking Company North Philadelphia Plant Disbursement Account, General Baking Company North Philadelphia Plant Deposit Account; General Baking Company South Philadelphia Plant Disbursement Account, General Baking [fol. 7] Company South Philadelphia Plant Deposit Account, General Baking Company West Philadelphia Plant Disbursement Account, General Baking Company West Philadelphia Plant Deposit Account.

"Disbursement Accounts:

"These accounts represent the checking accounts of our bakeries and you will kindly honor all checks drawn on these accounts signed by the authorized signatures duly given you. It is understood in accordance with the enclosed copies of resolutions that in addition to the manager's signature to the checks drawn by these plants, there may be at times checks drawn by the executive officers to be countersigned by the President or Vice President and signed by the Treasurer or Assistant Treasurer which you will also honor. The only items of deposit or credit to this account will be by check from this main office to your order and deposited by our bakery plant in your bank.

"Deposit Accounts:

"These accounts will be used for the deposit of monies received by our bakery plants against which there will be no checking authority except those checks which may be drawn by this main office and signed by the Treasurer or Assistant Treasurer and countersigned by the President or Vice President. Each day the bakery will deliver to your bank the deposit of monies received by them which should be credited to the General Baking Company's respective Deposit Accounts. Each day when delivering a deposit to your bank the bakery's representative will hand your representative a printed post card advice of deposit made which should be signed by you and mailed direct to the executive offices of the General Baking Company, 342 Madison Avenue, New York City.

"On Monday of each week it is understood we will receive from you in cash funds the balance of the three de- [fol. 8] posit accounts as of the close of business the pre-

vious Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records."

A copy of said letter is attached hereto, marked "Exhibit B," and made a part hereof.

7. On or about August 24, 1925, your orator received a letter from the Franklin Trust Company, dated August 22, 1925, which stated, inter alia:

"We will agree to collect your daily deposits from your Philadelphia plants, and deliver weekly payrolls in envelopes to these plants on such days and at such time that will be agreeable to the various managers of said plants. Wherever possible however, we trust that you can arrange for payroll delivery and collections to be made simultaneously.

"We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above that come within the Philadelphia zone.

"You are to send us a general letter of instructions covering detail of operation, at the time that you send us the usual and necessary certifications of signatures.

"In consideration of the above it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies [fol. 9] received from your Philadelphia plants and out of town distributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon.

"The Disbursement Account is the active checking account for the benefit of the branches in Philadelphia. On Wednesday of each week you will send to this account approximately $25,000.00 for each of the three (3) plant disbursement accounts. You are to file with us authorized signatures of branch managers and assistant branch managers to cover this account, and it is also understood that in addition to such signatures we are to honor checks that may be drawn from time to time by the executive officers, signed by the Treasurer or Assistant Treasurer, and counter-signed by the President or Vice-President."

A copy of said letter is attached hereto, marked "Exhibit C," and made a part hereof.

8. On or about August 25, 1925, your orator entered into an oral agreement with the Franklin Trust Company, the terms and conditions of which were:

(a) Your orator would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account."

(b) On Wednesday of each week, your orator would forward, from its New York office to the Franklin Trust [fol. 10] Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks; on Monday of each week to your orator, or its depository in New York City; said account to be known as a "Deposit Account."

(d) The Franklin Trust Company would select, subject to the approval of your orator, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be

mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to your orator, or its depository in New Yerk City.

(e) That your orator might, at the special request and for the sole benefit of the Franklin Trust Company, from [fol. 11] time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby your orator would allow the Franklin Trust Company to retain certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums so retained to be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

9. The Franklin Trust Company, pursuant to the terms of said agreement, referred to in Paragraph 8 hereof, with the approval of your orator, selected the following banks in New Jersey, Delaware and Eastern Pennsylvania (hereinafter called correspondent banks):

The First Mechanics National Bank of Trenton, Trenton, N. J.

West Jersey Trust Company, Parkside Branch, Camden, N. J.

The First National Bank, Pleasantville, N. J.

Delaware County National Bank, Chester, Pa.

National Bank of Chester Valley, Coatesville, Pa.

The Wayne Title & Trust Company, Wayne, Pa.

Wilmington Trust Company, Wilmington, Del.

The Allentown National Bank, Allentown, Pa.

Farmers National Bank and Trust Company, Reading, Pa.

10. On September 27, 1925, your orator received a letter from the Franklin Trust Company, dated September 26, [fol. 12] 1925, to the effect that, inasmuch as collections made on Thursday by the correspondent banks were noted

on their books on Friday, and advices thereof were received by, and noted on the books of the Franklin Trust Company on Saturday, the last out-of-town collections to be included in the amount forwarded each Monday to your orator in New York City would be those received by the correspondent banks on the preceding Thursday. Your orator acknowledged this by letter, dated September 28, 1926. Copies of these letters are attached hereto, made a part hereof, and marked "Exhibit D" and "Exhibit E," respectively.

11. From August, 1925, until August, 1930, your orator and the Franklin Trust Company performed all the terms and conditions of the agreement, (referred to in Paragraph 8 hereof).

12. In accordance with Clause (e) of the agreement (referred to in Paragraph 8 hereof) your orator, at the special request and for the sole benefit of the Franklin Trust Company, did, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby the Franklin Trust Company retained certain sums for certain periods of time, instead of forwarding to your orator, or its depository, in New York City. The sums left by your orator in accordance with these special agreements were subject to call by check signed by authorized officers of your orator. The approximate dates of said agreements, the total sums retained, and the dates when the sums were called are as follows:

[fol. 13] November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
Called by three checks:		
One dated March 29, 1928	140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	100,000.00	440,000.00
June, 1928		$100,000.00
Called by check dated June 29, 1928	$100,000.00	100,000.00

13. In August, 1930, your orator and the Franklin Trust Company orally agreed to, and did, modify the agreement of August, 1925 (referred to in Paragraph 8 hereof), so that the terms and conditions were:

(a) That your orator would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

(c) That on Wednesday of each week your orator would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

[fol. 14] (d) That said Franklin Trust Company would continue to accept from your orator's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to your orator, or its depository, in New York City; said account to continue to be known as a "Deposit Account."

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by your orator, would continue to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday and Wednesday of each week, to your orator, or its depository, in New York City.

(f) That your orator might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and dis-

tinct oral agreements with the Franklin Trust Company [fol. 15] whereby your orator would allow the Franklin Trust Company to retain certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

14. From August, 1930, until October 5, 1931, or thereabout, your orator carried out and performed all of its obligations under the terms of the said agreement (referred to in Paragraph 13 above), and in accordance with Clause (f) thereof, at the oral request of the Franklin Trust Company, your orator orally agreed to, and did, allow the Franklin Trust Company to retain during September and the early part of November, 1930, sums totalling $100,000.00 which were called by check, dated November 18, 1930, in the amount of $100,000.00.

15. The Franklin Trust Company, in accordance with Clauses (d) and (e) of the said agreement (referred to in Paragraph 13 above), forwarded, on Monday and Wednesday of each week, the entire amount of cash and the proceeds of checks and drafts, collected during the period from August, 1930, to September 30, 1931, except the said sum of $100,000.00 (referred to in Paragraph 14 hereof), and the sum of $1917.10 (referred to in Paragraph 19 hereinafter).

16. Your orator delivered to the correspondent banks, for the purpose set forth in Clause (e) of Paragraph 13 hereof, drafts, checks and cash, on the dates and in the amounts, as follows:

[fol. 16]

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less returned check			20.85
			$30,486.16

17. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks, received on October 3 and 5, 1931, and credit advices thereof were received by the Franklin Trust Company, on or after October 6, 1931.

18. The checks and drafts delivered to the correspondent banks by your orator on October 3 and 5, 1931, were not collected by them until October 6, 1931, or thereafter.

19. On September 26, 1931, your orator, for the purpose specified in said agreement (referred to in Paragraph 13, Clause (e) hereof), delivered cash, also drafts and checks, in the amount of $1,917.10 to the Wilmington Trust Company, Wilmington, Delaware, but through error, advice of the receipt of said sum by the Wilmington Trust Company was not received by the Franklin Trust Company until October 6, 1931, or thereafter.

20. The total amount of cash, drafts and checks delievered by your orator to the said correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose set forth in Clause (e) of said agreement (referred to in Para- [fol. 17] graph 13 hereof), was $32,403.26, which sum was in possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow pending a determination by this Court as to whom it should be paid.

21. Your orator delivered to the Franklin Trust Company in Philadelphia for the purpose set forth in Clause (d) of the agreement (Paragraph 13 hereof), checks, drafts and cash on the dates and in the amounts, as follows:

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17

22. The drafts and checks delivered by your orator to the Franklin Trust Company on October 3, 1931, were not colected by it until on or after October 6, 1931.

23. The Franklin Trust Company did not forward on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03, delivered to it on October 3, 1931, or a total sum of $40,642.67.

24. The cash, together with the proceeds from the drafts and checks in the amount of $49,590.17 (referred to in Paragraph 21 hereof), were diverted to, and mingled with, the cash funds of Franklin Trust Company, without your orator's consent or approval.

[fol. 18] 25. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, were augmented to the extent of $49,590.17, by your orator's delivery to the Franklin Trust Company of the said cash, drafts and checks (referred to in Paragraph 21 hereof).

26. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, have been, at all times since the Franklin Trust Company accepted from your orator the cash, drafts and checks (referred to in Paragraph 21 hereof), and now are, in excess of the total amount of said cash, and the proceeds of said drafts and checks.

27. There were, and now are, assets of the Franklin Trust Company in the possession and control of the defendants sufficient to pay in full your orator and all other preferred claimants.

28. Your orator has demanded of the defendant, William D. Gordon, through his agent in charge, defendant John J. Sullivan, the sum of $32,403.26, now held in escrow, and the sum of $49,590.17, or the total sum of $81,993.43, but the defendants refused, and still refuse, to pay the said sum or any part thereof to your orator.

29. Your orator is informed, believes and, therefore, avers, that it has no plain, adequate, and complete remedy at law.

Wherefore, your orator prays:

(a) That it be ordered and decreed that the defendants hold in trust for your orator the sum of $49,590.17, accepted by the Franklin Trust Company for the purpose of forwarding to your orator in New York City;

[fol. 19] (b) That it be ordered and decreed that the total sum of $32,403.26, collected by the correspondent banks for forwarding by the Franklin Trust Company to your orator in New York City, and now held in escrow, is the property of, and belongs to, your orator;

(c) That it be ordered and decreed that your orator has a lien on the assets of the Franklin Trust Company now in the possession and control of the defendants;

(d) That it be ordered and decreed that your orator has a lien on the sum of $32,403.26, now held in escrow;

(e) That it be ordered and decreed that the defendants pay immediately to your orator the said sum of $49,590.17, with legal interest thereon from October 5, 1931;

(f) That it be ordered and decreed that the sum of $32,403.26, together with interest thereon, now held in escrow be immediately paid to your orator;

(g) That such other and further relief as the equities in this case may require and as your Honors may deem proper be ordered and decreed.

And it will ever pray, etc.

Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Complainant.

[fol. 20] *Duly sworn to by A. A. Clarke. Jurat omitted in printing.*

Exhibits "A," "B," "C," "D" and "E," Attached to Amended Bill of Complaint

The same as Exhibits "A," "B," "C," "D," "E," "DD" and "EE," presented as part of the amended Bill of Complaint as Amended (filed December 6, 1932) and printed side folios 55 to 72 of this record.

[fol. 21] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED BILL OF COMPLAINT OF JOHN J. SULLIVAN, SPECIAL DEPUTY, ON BEHALF OF WILLIAM D. GORDON, SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, A CORPORATION, AND ON HIS OWN BEHALF AS SPECIAL DEPUTY IN CHARGE—Filed May 9, 1932.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, by John J. Sullivan, Special Deputy as Agent, and John J. Sullivan, Special Deputy in charge, come and file this, their answer to the complainant's amended Bill in the above matter, reserving the right of exception to the errors and uncertainties in the complainant's amended Bill contained, and for answer thereto and to so much and such parts thereof as defendants, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy as Agent, are advised are material or necessary to answer, say:

1. The averments of fact in paragraph 1 of said amended Bill are admitted to be true.

2. The averments of fact in paragraph 2 of said amended Bill are admitted to be true.

3. The averments of fact in paragraph 3 of said amended Bill are admitted to be true.

[fol. 22] 4. The defendants admit that an agreement was entered into between Franklin Trust Company and the complainant in August, 1925, under the terms and conditions as averred in plaintiff's amended Bill of Complaint, as qualified in this Answer.

5. The averments of fact in paragraph 5 of said amended Bill are admitted to be true.

6. The averments of fact in paragraph 6 of said amended Bill are admitted to be true.

7. The averments of fact in paragraph 7 of said amended Bill are admitted to be true.

8. Your deponents qualify the averments of paragraph 8 of the amended Bill of Complaint as follows:

The facts alleged in sub-divisions A and B of paragraph 8 of the amended Bill of Complaint are admitted. Defendants qualify the allegations in subdivision C of paragraph 8 of the amended Bill of Complaint as follows:

As by reference to the exhibits to the amended Bill of Complaint will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a "deposit account" in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository.

[fol. 23] The defendants qualify sub-division D of paragraph 8 of the amended Bill of Complaint as follows:

It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit advice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's "deposit account" in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City.

Defendants qualify sub-division E of paragraph 8 of the amended Bill of Complaint as follows:

Defendants have no knowledge that the agreement as therein set forth was entered into by the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material demand proof thereof. Defendants aver moreover that the allegation that said contract was entered into for the sole benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant.

9. Defendants admit the averments of paragraph 9 of the amended Bill of Complaint, with the qualification that [fol. 24] the banks therein listed were selected under the terms and conditions of the agreement set forth in paragraph 8 of the amended Bill of Complaint, as qualified in this Answer.

10. The averments of fact in paragraph 10 of said amended Bill are admitted to be true.

11. Defendants admit the facts contained in paragraph 11 of the amended Bill of Complaint, with the qualification that the terms and conditions of the agreement which were performed by the complainant and the Franklin Trust Company were those terms and conditions contained in the agreement as alleged in paragraph 8 of the amended Bill of Complaint and as qualified herein.

12. Defendants admit the allegations in paragraph 12 of the amended Bill of Complaint, with the qualification that they deny that the funds deposited by the complainant, as therein alleged, were deposited at the special request and for the sole benefit of the Franklin Trust Company.

13. Your deponents admit the facts alleged in sub-divisions A, B, and C of paragraph 13 of the amended Bill of Complaint. Defendants, in reply to sub-division D thereof, admit that the Franklin Trust Company continued to accept moneys from complainant's distributors in Philadelphia, the same to be deposited in the "deposit account" of the complainant and to be forwarded, on Monday and Wednesday of each week, to complainant in New York City or its depository; and for further answer as to the terms and conditions of the contract under which such moneys

were deposited, refer to their allegations in reply to sub-division C of paragraph 8 of the amended Bill of Com- [fol. 25] plaint. Defendants, in reply to sub-division E of paragraph 13 of the amended Bill of Complaint, admit that the correspondent banks selected by the Franklin Trust Company and approved by complainant continued to accept moneys deposited by complainant's distributors in the outlying banks, said funds to be remitted to Franklin Trust Company and credited to the General Baking Company's "deposit account", and the proceeds thereof to be forwarded on Monday and Wednesday of each week to complainant or its depository in New York City; but for further answer qualify the allegations as to the terms and conditions of the agreement entered into between complainant and Franklin Trust Company in the same manner as they have qualified, by their answer, the allegations contained in sub-division D of paragraph 8 of complainant's amended Bill of Complaint.

In reply to sub-division F of paragraph 13 of the amended Bill of Complaint, defendants admit the facts as therein contained, with the qualification that the sums of money referred to therein were to be deposited by the complainant with the Franklin Trust Company from time to time at the special instance and for the sole benefit of the Franklin Trust Company, for the same reason as they have qualified in this Answer a similar averment in sub-division E of paragraph 8 of the amended Bill of Complaint.

14. Defendants admit the facts alleged in paragraph 14 of the amended Bill of Complaint, with the qualification that they have no knowledge that the funds deposited with Franklin Trust Company were so deposited at the oral request of the Franklin Trust Company and, if the same is material, demand proof thereof.

15. Defendants admit the allegations of paragraph 15 of the Bill of Complaint, with the qualification that where [fol. 26] reference is made to certain clauses in sub-divisions D and E of paragraph 13 of the amended Bill of Complaint, paragraph 14, and paragraph 19 of the amended Bill of Complaint, the defendants incorporate by reference their reply to the corresponding paragraphs in this Answer.

16. Defendants admit the allegations in paragraph 16 of the amended Bill of Complaint, with the qualification

that where reference is made to paragraph 13, sub-division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

17. The averments of fact in paragraph 17 of said amended Bill are admitted to be true.

18. The averments of fact in paragraph 18 of said amended Bill are admitted to be true.

19. Defendants admit the allegations in paragraph 19 of the amended Bill of Complaint, with the qualification that where reference is made to paragraph 13, sub-division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

20. Defendants admit the allegations in paragraph 20 of the amended Bill of Complaint, with the qualification that where reference is made to paragraph 13, sub-division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

21. Defendants admit the allegations in paragraph 21 of the amended Bill of Complaint, with the qualification that [fol. 27] where reference is made to paragraph 13, sub-division D, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

22. The averments of fact in paragraph 22 of said amended Bill are admitted to be true.

23. The averments of fact in paragraph 23 of said amended Bill are admitted to be true.

24. The averments of fact in paragraph 24 of said amended Bill are admitted to be true.

25. The averments of fact in paragraph 25 of said amended Bill are admitted to be true.

26. The averments of fact in paragraph 26 of said amended Bill are admitted to be true.

27. The averments of fact in paragraph 27 of said amended Bill are admitted to be true.

28. The averments of fact in paragraph 28 of said amended Bill are admitted to be true.

29. Defendants deny that the complainant is entitled to the equitable relief prayed for in paragraph 29 of the amended Bill of Complaint, for the reasons as herein set forth. For further answer, defendants aver that whatever rights may be possessed by the complainant herein cannot now be asserted in a separate proceeding, and defendants allege that the proceedings against the Franklin Trust Company, whereby and wherein the Secretary of Banking took possession of the same, having been instituted in the Court of Common Pleas No. 5 of Philadelphia County, as of September Term, 1931, No. 3941, the District Court of the [fol. 28] United States for the Eastern District of Pennsylvania does not have jurisdiction to adjudicate and pass upon the facts and circumstances as alleged in the complainant's Bill in Equity. Deponents further aver that whatever rights may be possessed by the complainant cannot be asserted prior to the audit and adjudication of the account of the Deputy in charge of the Franklin Trust Company of his administration and liquidation of the affairs of said company, at which time and place the complainant may appear and establish its rights in the manner provided by the laws of the Commonwealth of Pennsylvania. Defendants further aver that the facts and circumstances as alleged in the Bill of Complaint and qualified herein do not establish a trust relationship between the complainant and Franklin Trust Company as to the sum of $49,590.17 which was on deposit in the Franklin Trust Company at the date the Secretary of Banking took possession thereof, nor a trust relationship as to the sum of $32,403.26, which sum was collected by the correspondent banks under the terms and conditions as set forth in the Bill of Complaint (as qualified herein) and was in their possession when the Secretary of Banking took possession of the business and property of the Franklin Trust Company and is now held in escrow, pending the determination of this action. Defendants aver that under the law, as applied to the facts herein, the complainant is not entitled to a preferred claim against the estate of the Franklin Trust Company now being administered by the Secretary of Banking, but has merely the status of depositor and as such must

present its claim at the audit of the account. Defendants further allege that, whatever relationship existed between the complainant and the Franklin Trust Company, the complainant is not entitled to a preferred claim at this time, and that no sums of money should be paid to the complain-
[fol. 29] ant until such time as the account of the Secretary of Banking in possession of the business and property of the Franklin Trust Company shall have been audited and the Court of Common Pleas No. 5 of Philadelphia County shall have ordered distribution of the funds accounted for therein.

Defendants further aver that the complainant has an adequate remedy at law and therefore is not entitled to equitable relief in the premises, and pray that the amended Bill of Complaint may be dismissed, with their reasonable costs and charges in this behalf sustained.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Company, by John J. Sullivan, Special Deputy as Agent.

Duly sworn to by John J. Sullivan. Jurat omitted in printing.

[fol. 30] IN UNITED STATES DISTRICT COURT

OPINION SUR PLEADINGS AND PROOFS—Filed October 11, 1932

KIRKPATRICK, J.:

This cause was heard upon bill and answer. Consequently, the answer is to be taken as true in all particulars whether responsive to the bill or not (Leeds v. Insurance Company, 15 U. S. 380; Terral v. Burke Construction Company, 257 U. S. 529) and only such averments of the bill as are not controverted are to be taken as admitted.

Franklin Trust Company is a banking institution in the city of Philadelphia which at the close of the business day of October 5, 1931, was taken over for liquidation by the Secretary of Banking of Pennsylvania and, which, it may be assumed, is largely insolvent. This plaintiff is endeavoring to impress certain of the funds of the bank, now in the hands of the special deputy in charge with a trust in its

favor. The plaintiff's case depends upon the legal effect of an oral agreement between it and the trust company made on October 25, 1925, and subsequently, on August —, 1930, slightly modified. From the averments of the bill and answer, the arrangement was as follows:

The plaintiff whose general offices were in New York had three principal places of business or plants in the city of Philadelphia, and in addition made sales through a number of distributors located at various points outside Philadelphia in Pennsylvania and New Jersey.

The Trust Company agreed to accept from the Philadelphia plants cash, drafts and checks, the same to be deposited in what was designated as "a deposit account" in the name of the plaintiff, and the cash together with the proceeds of [fol. 31] the drafts and checks to be forwarded on Mondays and Wednesdays of each week to the plaintiff in New York. The bill avers that the Trust Company was to take the drafts and checks "for collection". The answer which purports to "qualify the allegations" of the bill says "said deposits to be credited to the complainant * * * and on Monday of each week the balance in the deposit account * * * to be forwarded to * * * the General Baking Company in New York."

In addition to the foregoing, the parties designated certain out-of-town banks with which the Trust Company was to make arrangements by which the plaintiff's out-of-town distributors would deposit their moneys in such banks, subject to withdrawal only by check of the Trust Company, all money so deposited to be credited to the complainant's deposit account in the Trust Company upon the receipt by it of credit advices by the receiving banks, the proceeds to be forwarded to the plaintiff in New York on Mondays and Wednesdays along with the proceeds of the Philadelphia plants. The bill avers that the deposits in the out-of-town banks were to be "ear-marked as the funds" of the plaintiff. The "qualification" of the answer omits this averment.

The Trust Company undertook to make up and deliver weekly pay-rolls in envelopes to the Philadelphia plants, collecting the deposits at the same time, when possible.

In addition to the deposit account, the plaintiff agreed to open another account with the Trust Company—this one a checking account designated as its "disbursement account". This account was to be kept entirely separate from

the deposit account, and the plaintiff agreed that it would maintain it at an average balance of not less than $25,000 by means of weekly deposits from its New York office. Origi-
[fol. 32] nally, the Trust Company had agreed to allow 2% interest on this account but when, by the subsequent agreement, it was required to forward the balance in the disbursement account twice a week instead of once as previously, the interest provision was eliminated.

The disbursement account was not subject to check, except that the original agreement contemplated that the parties might from time to time specially agree to permit the balances in the disbursement account to remain in the Trust Company for longer than semi-weekly periods, in which case at the expiration of such agreed time the funds would be called by check of the plaintiff, instead of being sent to it in the usual way. Special agreements of this kind were made and carried out on three different occasions, at which times balances of $450,000, $440,000 and $100,000 respectively were allowed to remain with the Trust Company for periods of a month or two.

When the Trust Company closed its doors, it had on deposit approximately $36,000 in the disbursement account. The plaintiff admits that it has no preferred claim as to this amount and it is not involved in this case. There was $49,930.17 on deposit to the plaintiff's credit in the deposit account. In addition, the various out-of-town correspondent banks had accepted deposits of cash, drafts and checks from the plaintiff's out-of-town distributors amounting in all to $32,403.26. The receipt of this amount, had been noted on the books of those correspondent banks on Monday, October 5th, the last day on which the Trust Company was open for business and credit advices as to it arrived at the Trust Company on the following day.

The plaintiff originally attempted to enjoin the special deputy in charge of the bank from collecting these funds but, upon a stipulation made at the hearing of that proceeding, it was ordered that the defendants would collect and place
[fol. 33] this sum in escrow pending a decision by this court as to whom it should be paid.

It seems to be agreed that there was no segregation of the funds in the plaintiff's deposit account, but that whatever was received either direct from the plaintiff's plants in Philadelphia or from the out-of-town banks was mingled

with the general funds of the Trust Company. Just what the whole arrangement between the Trust Company and the correspondent banks was does not fully appear. It is plain however that the original agreement between the plaintiff and the Trust Company contemplated that all the deposits in the correspondent banks were ultimately to be paid into the plaintiff's deposit account in the Trust Company and dealt with in exactly the same way as the money directly deposited by the plaintiff's Philadelphia plants.

After a careful consideration of all the matters before me I am satisfied that the parties in this case did not create or contemplate a trust relation as to the deposit account, and that this applies equally to the money directly deposited by the plaintiff's Philadelphia plants and that received through the out-of-town correspondent banks.

The crux of the matter is whether it was intended that the Trust Company should have the use of the funds of this account during the brief periods for which they remained in its hands. It is extremely significant, though of course not conclusive, that the agreement between the parties does not contain any term expressly creating a trust relationship or any expression which even remotely suggests it. Even if the averment of the bill that the deposits were received "for collection" in the ordinary commercial sense could be taken as admitted (which is doubtful in view of the qualified answer) it would make little difference, since it is conceded that cash, drafts and checks were all to go into the deposit [fol. 34] account indiscriminately under the same terms and of course it would be patently absurd to speak of accepting cash deposit for collection. Nor was there any requirement that the plaintiff's deposit account was to be kept separate from the general funds of the Trust Company. The plaintiff was not to check upon it, and hence it was necessary to distinguish it in some way from its checking account which appears to be the only reason for its name.

The fact that the parties contemplated and actually made subsequent arrangements by which large amounts of money in the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to change the character of the deposit or the relationship created thereby is more than merely suggestive. What could be the purpose of these special arrangements unless it was understood all along that the

money on deposit was being used by the Trust Company in its general banking business and it was desired to give them the use of more money for a longer time?

The general arrangement is not unusual in the case of chain stores and the like which do their principal banking in one city but have branch stores which take in large amounts of money in other places. At first it is a little difficult to identify the relationship which it established but upon examination it becomes clear enough. The Trust Company offered the plaintiff a service which relieved it of considerable difficulty and expense. Besides supplying its banking facilities for the transmission of the plaintiff's money to New York, it undertook the physical work of making the plaintiff's deposits both in Philadelphia and the surrounding territory as well as that of making up and delivering the plaintiff's pay-rolls in Philadelphia. As the agreement originally stood, unless it could use the funds on deposit, it [fol. 35] would receive practically no benefit from all this beyond what might accrue from the plaintiff's $25,000 checking account on which it will be remembered interest at 2% was originally to be paid. Of course that account was desirable, but it is significant that when the original agreement was modified so that the Trust Company was required to remit to New York twice a week instead of once, thus greatly reducing the average of the deposit account in its hand, it was relieved of paying interest on the checking account.

The creation of the separate checking account does not preclude the view taken by any means. The plaintiff in New York received immediate credit advice of all deposits made to its credit in the deposit account and probably at once credited them to its general funds in New York, and there may have been a number of reasons why it was convenient and desirable for it to keep this account intact for the semi-weekly remittances.

The parties have argued the case as though there were two questions involved. First, the existence of the trust relationship and, second, the traceability of the trust fund if any. I agree with the plaintiff that the doctrine of Knatchbull v. Hallett is the law of both Pennsylvania and the federal courts but its application depends upon a tortious intermingling of trust funds, because, as the court says, the presumption is that withdrawals so far as possible are honestly made from the trustee's own funds and therefore what is

left would be trust money. If, however the mingling of the funds is innocent the reason of the rule fails. And, of course, it is innocent when both parties agreed or intended that it should be mingled. If, to go a step further, such was the agreement or intention, not only would there be no rule for tracing the trust but there would be no trust. Any deposit by which money is to be used for the general business [fol. 36] of the depository by its inherent nature creates the relationship of debtor and creditor, and immediately negatives the existence of a trust.

All the questions argued in the case therefore depend upon the essential issue whether this deposit account was to be used by the Trust Company in its general banking business. I think that that was clearly the intention.

It follows that there is no essential difference in the character of the deposit account in the Trust Company and the deposit in the hands of the correspondent banks at the close of business on October 5th. It was understood that these would all go into the general deposit account. It was understood therefore that they would be mingled with and used in the same manner as the general funds of the bank. Upon the deposit being made in a correspondent bank, it was immediately credited to the Trust Company and thereafter was subject to withdrawal only by that company. Of course there must have been a physical segregation of these deposits in the hands of the corrspondent banks for some brief period immediately after their receipt. Nor can the precise legal effect of their daily credit advices to the Trust Company be determined from the bill and answer. But what the parties intended as the ultimate disposition of the feud is the controlling factor. The mere fact that time and banking machinery were required to get these deposits into the general moneys of the Trust Company during which period they may have been susceptible of identification is unimportant, unless there were something definite to indicate that the parties intended that two different kinds of relationship should successively come into being with regard to those out-of-town deposits, namely, a trust relationship until they reached the deposit account and a debtor and creditor relationship thereafter. That would be a curious [fol. 37] thing to do, and there is nothing of the sort in this case.

As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority.

The general conclusion is that there is no trust relationship as to either of the funds involved in this suit and the plaintiff is not entitled to a preferred claim against the estate of the Franklin Trust Company, but has merely the status of a depositor.

The bill may be dismissed, with costs.

By the Court.

W. H. Kirkpatrick, J.

[fol. 38] IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT AS AMENDED—Filed December 6, 1932

To the Honorable, the Judges of the Said Court:

Your orator complains and says:

1. Your orator is the General Baking Company, a corporation organized and existing under the laws of the State of New York, with principal offices and place of business in New York City, New York, and at the times hereinafter mentioned, sold and distributed bread, cakes, and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania.

2. The defendants are William D. Gordon, Secretary of the Department of Banking for the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy, who, at the close of the business day of October 5, 1931, closed and took possession and control of the business and property of the Franklin Trust Company, a corporation engaged in

banking and organized under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania.

3. The amount in controversy herein is in excess of three thousand dollars ($3000), exclusive of interest and costs, and the parties involved are citizens of different States of the United States.

4. In June of 1925, the Franklin Trust Company sought to enter into an agreement with your orator for the purposes and under the terms and conditions as are hereinafter averred in paragraph 8 hereof.

[fol. 39] 5. On or about June 13, 1925, your orator received a letter from the Franklin Trust Company, dated June 12, 1925, which stated, inter alia:

"We will agree to collect deposits from your various Philadelphia plants, and deliver weekly payrolls to these branches in either bulk or individual envelopes,—this to be optional with you,—on days and at times you may elect. We hope, however, that you will arrange for payroll delivery and deposit collection to be made simultaneously wherever possible.

"It is our understanding that you have, or contemplate opening, branches in the following places:

"Norristown, Trenton, Ocean City, Burlington, Atlantic City, Princeton, Wildwood, Pleasantville, Clementon, Wilmington, Berlin, Chester, Camden, Vineland, Millville, Bridgeton, Sea Isle City.

"We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above list that you include in this district.

"In the event that the above plan is acceptable to you, the minor details, such as mailing duplicate deposit tickets, etc., will all be arranged in accordance with your wishes.

"In consideration of the above it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the

balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum."

[fol. 40] A copy of said letter is attached hereto, marked "Exhibit A," and made a part hereof.

6. On or about August 20, 1925, your orator sent a letter to the Franklin Trust Company, stating, inter alia:

"While I have outlined to Mr. Vance the operation of the accounts to be maintained with you I will confirm it herewith: You are to maintain one account for each of our three branches or a total of three accounts to be known as 'General Baking Company Disbursement Account.' You are to operate and maintain one account for each of our three branches or a total of three accounts to be known as 'General Baking Company Deposit Account.' The official designation of the accounts will be for instance: General Baking Company North Philadelphia Plant Disbursement Account, General Baking Company North Philadelphia Plant Deposit Account, General Baking Company South Philadelphia Plant Disbursement Account, General Baking Company South Philadelphia Plant Deposit Account, General Baking Company West Philadelphia Plant Disbursement Account, General Baking Company West Philadelphia Plant Deposit Account.

"Disbursement Accounts:

"These accounts represent the checking accounts of our bakeries and you will kindly honor all checks drawn on these accounts signed by the authorized signatures duly given you. It is understood in accordance with the enclosed copies of resolutions that in addition to the manager's signature to the checks drawn by these plants, there may be at times checks drawn by the executive officers to be countersigned by the President or Vice President and signed by the Treasurer or Assistant Treasurer which you will also honor. The only items of deposit or credit to this account will be by check from this main office to your order and deposited by our bakery plant in your bank.

[fol. 41] "Deposit Accounts:

"These accounts will be used for the deposit of monies received by our bakery plants against which there will be

no checking authority except those checks which may be drawn by this main office and signed by the Treasurer or Assistant Treasurer and countersigned by the President or Vice President. Each day the bakery will deliver to your bank the deposit of monies received by them which should be credited to the General Baking Company's respective Deposit Accounts. Each day when delivering a deposit to your bank the bakery's representative will hand your representative a printed post card advice of deposit made which should be signed by you and mailed direct to the executive offices of the General Baking Company, 342 Madison Avenue, New York City.

"On Monday of each week it is understood we will receive from you in cash funds the balance of the three deposit accounts as of the close of business the previous Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records."

A copy of said letter is attached hereto, marked "Exhibit B," and made a part hereof.

7. On or about August 24, 1925, your orator received a letter from the Franklin Trust Company, dated August 22, 1925, which stated, inter alia:

"We will agree to collect your daily deposits from your Philadelphia plants, and deliver weekly payrolls in envelopes [fol. 42] to these plants on such days and at such time that will be agreeable to the various managers of said plants. Wherever possible however, we trust that you can arrange for payroll delivery and collections to be made simultaneously.

"We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above that come within the Philadelphia zone.

"You are to send us a general letter of instructions covering detail of operation, at the time that you send us the usual and necessary certifications of signatures.

"In consideration of the above it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies received from your Philadelphia plants and out of town distributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon.

"The Disbursement Account is the active checking account for the benefit of the branches in Philadelphia. On Wednesday of each week you will send to this account approximately $25,000.00 for each of the three (3) plant disbursement accounts. You are to file with us authorized signatures of branch managers and assistant branch managers to cover this account, and it is also understood that in addition to such signatures we are to honor checks that may be drawn [fol. 43] from time to time by the executive officers, signed by the Treasurer or Assistant Treasurer, and countersigned by the President or Vice-President."

A copy of said letter is attached hereto, marked "Exhibit C," and made a part hereof.

8. On or about August 25, 1925, your orator entered into an oral agreement with the Franklin Trust Company, the terms and conditions of which were:

(a) Your orator would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account."

(b) On Wednesday of each week, your orator would forward, from its New York office to the Franklin Trust Company, a sum sufficent to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the

cash, together with the proceeds of the drafts and checks, on Monday of each week to your orator, or its depository in New York City; said account to be known as a "Deposit Account."

(d) The Franklin Trust Company would select, subject to the approval of your orator, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately [fol. 44] upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to your orator, or its depository in New York City.

(e) That your orator might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby your orator would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

9. The Franklin Trust Company, pursuant to the terms of said agreement, referred to in Paragraph 8 hereof, with the approval of your orator, selected the following banks in New Jersey, Delaware and Eastern Pennsylvania (hereinafter called correspondent banks):

The First Mechanics National Bank of Trenton, Trenton, N. J.

West Jersey Trust Company, Parkside Branch, Camden, N. J.

The First National Bank, Pleasantville, N. J.
Delaware County National Bank, Chester, Pa.
National Bank of Chester Valley, Coatesville, Pa.
The Wayne Title & Trust Company, Wayne, Pa.
[fol. 45] Wilmington Trust Company, Wilmington, Del.
The Allentown National Bank, Allentown, Pa.
Farmers National Bank and Trust Company, Reading, Pa.

9A.

"On September 9th, 1925, your orator, through its Treasurer, wrote to the Franklin Trust Company, in part as follows: 'I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer of the American Exchange Pacific National Bank of $161,680.42. This transfer was not effected in cash funds.'

A true and correct copy of said letter is attached hereto and marked Exhibit 'D'. The Franklin Trust Company acknowledged receipt of said letter dated September 9th, on September 11th, 1925, in which it advised your orator as follows:

'Mr. Vance has handed me your letter of September 9th, advising that the transfer was not effected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

'We have advised the First National today again that this transfer *must* be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr. Vance tells me that you understand the situation thoroughly and we appreciate your broad minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again.'

[fol. 46] A true and correct copy of said letter is attached hereto and marked Exhibit 'E'."

10. On September 27, 1925, your orator received a letter from the Franklin Trust Company, dated September 26,

1925, to the effect that, inasmuch as collections made on Thursday by the correspondent banks were noted on their books on Friday, and advices thereof were received by, and noted on the books of the Franklin Trust Company on Saturday, the last out-of-town collections to be included in the amount forwarded each Monday to your orator in New York City would be those received by the correspondent banks on the preceding Thursday. Your orator acknowledged this by letter, dated September 28, 1925. Copies of these letters are attached hereto, made a part hereof, and marked "Exhibit 'DD'" and "Exhibit 'EE'" respectively.

11. From August, 1925, until August, 1930, your orator and the Franklin Trust Company performed all the terms and conditions of the agreement (referred to in Paragraph 8 hereof).

12. In accordance with Clause (e) of the agreement (referred to in Paragraph 8 hereof) your orator, at the special request and for the sole benefit of the Franklin Trust Company, did, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby the Franklin Trust Company was allowed to use certain sums for certain periods of time, instead of forwarding to your orator, or its depository, in New York City. The sums left by your orator in accordance with these special agreements were subject to call by check signed by authorized officers of your orator. The approximate dates of said agreements, the total sums used, and the dates when the sums were called are as follows:

[fol. 47]

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
Called by three checks:		
One dated March 29, 1928	140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	200,000.00	440,000.00
June, 1928		$100,000.00
Called by check dated June 29, 1928	$100,000.00	$100,000.00

13. In August, 1930, your orator and the Franklin Trust Company orally agreed to, and did, modify the agreement of August, 1925 (referred to in Paragraph 8 hereof), so that the terms and conditions were:

(a) That your orator would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

(c) That on Wednesday of each week your orator would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(d) That said Franklin Trust Company would continue to accept from your orator's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the [fol. 48] drafts and checks, on Monday and Wednesday of each week, to your orator, or its depository, in New York City; said account to continue to be known as a "Deposit Account."

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by your orator, would continue to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator's; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday and Wednesday of each week, to your orator, or its depository, in New York City.

(f) That your orator might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and distinct oral agreements with the Franklin Trust Company whereby

your orator would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by your orator's check [fol. 49] only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

14. From August, 1930, until October 5, 1931, or thereabout, your orator carried out and performed all of its obligations under the terms of the said agreement (referred to in Paragraph 13 above), and in accordance with Clause (f) thereof, at the oral request of the Franklin Trust Company, your orator orally agreed to, and did, allow the Franklin Trust Company to use during September and the early part of November, 1930, sums totalling $100,000.00 which were called by check, dated November 18, 1930, in the amount of $100,000.00.

15. The Franklin Trust Company, in accordance with Clauses (d) and (e) of the said agreement (referred to in Paragraph 13 above), forwarded, on Monday and Wednesday of each week, the entire amount of cash and the proceeds of checks and drafts, collected during the period from August, 1930, to September 30, 1931, except the said sum of $100,000.00 (referred to in Paragraph 14 hereof), and the sum of $1917.10 (referred to in Paragraph 19 hereinafter).

16. Your orator delivered to the correspondent banks, for the purpose set forth in Clause (e) of Paragraph 13 hereof, drafts, checks and cash, on the dates and in the amounts, as follows:

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less returned check			20.85
			$30,486.16

[fol. 50] 17. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks, received

on October 3 and 5, 1931 and credit advices thereof were received by the Franklin Trust Company, on or after October 6, 1931.

18. The checks and drafts delivered to the correspondent banks by your orator on October 3 and 5, 1931, were not collected by them until October 6, 1931, or thereafter.

19. On September 26, 1931, your orator, for the purpose specified in said agreement (referred to in Paragraph 13, Clause (e) hereof), delivered cash, also drafts and checks, in the amount of $1,917.10 to the Wilmington Trust Company, Wilmington, Delaware, but through error, advice of the receipt of said sum by the Wilmington Trust Company was not received by the Franklin Trust Company until October 6, 1931, or thereafter.

20. The total amount of cash, drafts and checks delivered by your orator to the said correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose set forth in Clause (e) of said agreement (referred to in Paragraph 13 hereof), was $32,403.26, which sum was in possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow pending a determination by this Court as to whom it should be paid.

21. Your orator delivered to the Franklin Trust Company in Philadelphia for the purpose set forth in Clause (d) of the agreement (Paragraph 13 hereof), checks, drafts and cash on the dates and in the amounts, as follows:

[fol. 51]

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17.

22. The drafts and checks delivered by your orator to the Franklin Trust Company on October 3, 1931, were not collected by it until on or after October 6, 1931.

23. The Franklin Trust Company did not forward on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03 delivered to it on October 3, 1931, or a total sum of $40,642.67.

24. The cash, together with the proceeds from the drafts and checks in the amount of $49,590.17 (referred to in Paragraph 21 hereof), were diverted to, and mingled with, the cash funds of Franklin Trust Company, without your orator's consent or approval.

25. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, were augmented to the extent of $49,590.17, by your orator's delivery to the Franklin Trust Company of the said cash, drafts and checks (referred to in Paragraph 21 hereof).

26. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, have [fol. 52] been, at all times since the Franklin Trust Company accepted from your orator the cash, drafts and checks (referred to in Paragraph 21 hereof) and now are, in excess of the total amount of said cash, and the proceeds of said drafts and checks.

27. There were, and now are, assets of the Franklin Trust Company in the possession and control of the defendants sufficient to pay in full your orator and all other preferred claimants.

28. Your orator has demanded of the defendant, William D. Gordon, through his agent in charge, defendant John J. Sullivan, the sum of $32,403.26, now held in escrow, and the sum of $49,590.17, or the total sum of $81,993.43, but the defendants refused, and still refuse, to pay the said sum or any part thereof to your orator.

29. Your orator is informed, believes and, therefore, avers that it has no plain, adequate, and complete remedy at law.

Wherefore, your orator prays:

(a) That it be ordered and decreed that the defendants hold in trust for your orator the sum of $49,590.17, accepted by the Franklin Trust Company for the purpose of forwarding to your orator in New York City;

(b) That it be ordered and decreed that the total sum of $32,403.26, collected by the correspondent banks for forwarding by the Franklin Trust Company to your orator in New York City, and now held in escrow, is the property of, and belongs to, your orator;

[fol. 53] (c) That it be ordered and decreed that your orator has a lien on the assets of the Franklin Trust Company now in the possession and control of the defendants;

(d) That it be ordered and decreed that your orator has a lien on the sum of $32,403.26, now held in escrow;

(e) That it be ordered and decreed that the defendants pay immediately to your orator the said sum of $49,590.17, with legal interest thereon from October 5, 1931;

(f) That it be ordered and decreed that the sum of $32,403.26, together with interest thereon, now held in escrow be immediately paid to your orator;

(g) That such other and further relief as the equities in this case may require and as your Honors may deem proper be ordered and decreed. And it will ever pray, etc.

Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Complainant.

[fol. 54] *Duly sworn to by A. A. Clarke. Jurat omitted in printing.*

[fol. 55] EXHIBIT "A" TO AMENDED BILL

June 12, 1925.

Mr. A. A. Clarke, Treasurer, General Baking Company, 342 Madison Avenue, New York City

DEAR MR. CLARK:

Referring to the conversation we had with you Friday last, we submit herewith a plan for the handling of your funds in Philadelphia and surrounding territory.

We will agree to collect deposits from your various Philadelphia plants, and deliver weekly payrolls to these branches in either bulk or individual envelopes,—this to be optional with you,—on days and at times you may elect. We hope, however, that you will arrange for payroll delivery and deposit collection to be made simultaneously wherever possible.

It is our understanding that you have, or contemplate opening, branches in the following places:

Norristown	Wildwood	Camden
Trenton	Pleasantville	Vineland
Ocean City	Clementon	Millville
Burlington	Wilmington	Bridgeton
Atlantic City	Berlin	Sea Isle City
Princeton	Chester	

We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above list that you include in this district.

In the event that the above plan is acceptable to you, the minor details, such as mailing duplicate deposit tickets, etc., will all be arranged in accordance with your wishes.

[fol. 56] In consideration of the above it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum.

We would appreciate your giving this proposition very careful consideration, as it appears to us it has many advantages for your Company, such as the control of all of these accounts through one bank, the elimination of the hazard of carrying money through the streets, and the payroll service undoubtedly bringing about added economy and increased efficiency.

Our Mr. Vance, who presents this letter to you, will be glad to go into any further details we may have overlooked.

Assuring you it is our strong desire to bring about business relations with your Company, and anticipating a favorable reply, we are,

Very truly yours, —— ——; Vice President and Treasurer.

ABD; LAF.

(Here follow 2 photos, Exhibit B, side folios 57-58, 59-60.)

EXHIBIT "A" & "B" TO AMENDED BILL

GENERAL BAKING COMPANY

EXECUTIVE OFFICES

342 MADISON AVENUE.

NEW YORK.

Mr Fernan

August 20, 1925.

32 PLANTS
BALTIMORE, MD.
BOSTON, MASS
BROOKLYN, N. Y.
BUFFALO, N. Y.
CANTON, OHIO
CLEVELAND, OHIO
DETROIT, MICH.
HARTFORD, CONN
JERSEY CITY, N. J.
NEWARK, N. J.
NEW HAVEN, CONN.
NEW YORK, N. Y.
NEW ORLEANS, LA.
NORFOLK, VA.
PHILADELPHIA, PA.
PROVIDENCE, R. I.
ROCHESTER, N. Y.
ST. LOUIS, MO.
SPRINGFIELD, MASS.
STEUBENVILLE, OHIO
SYRACUSE, N. Y.
TOLEDO, OHIO
WASHINGTON, D. C.
WATERBURY, CONN.
WHEELING, W. VA.

Franklin Trust Company,
15th & Chestnut Streets,
Philadelphia, Pa.

Gentlemen:-

In accordance with my conversation with your Mr. Vance, I am enclosing herewith certified copy of resolution as to official signatures for the Company, certification of the present officials and their signatures, which does not include the President's signature due to the fact that he is out of town, but which can be supplied at a later date. I am also enclosing herewith two official General Baking Company specimen signature cards duly executed with the exception of the President which you will be furnished with at a later date.

Our plants will each deliver to you at their earliest convenience a letter of certification of their appointment as Manager of their respective plants with specimen signatures of their respective plants for the account to be termed "General Baking Company Disbursement Account".

While I have outlined to Mr. Vance the operation of the accounts to be maintained with you I will confirm it herewith: You are to maintain one account for each of our three branches or a total of three accounts to be known as "General Baking Company Disbursement Account". You are to operate and maintain one account for each of our three branches or a total of three accounts to be known as "General Baking Company Deposit Account". The official designation of the accounts will be for instance: General Baking Company North Philadelphia Plant Disbursement Account, General Baking Company North Philadelphia Plant Deposit Account; General Baking Company South Philadelphia Disbursement Account, General Baking Company South Philadelphia Plant Deposit Account; General Baking Company West Philadelphia Plant Disbursement Account; General Baking Company West Philadelphia Plant Deposit Account.

Bond Bureau

57-5

Disbursement Accounts

These accounts represent the checking accounts of our bakeries and you will kindly honor all checks drawn on these accounts signed by the authorized signatures duly given you. It is understood in accordance with the enclosed copies of resolutions that in addition to the manager's signature to the checks drawn by these plants, there may be at times checks drawn by the executive officers to be countersigned by the President or Vice President and signed by the Treasurer or Assistant Treasurer which you will also honor. The only items of deposit or credit to this account will be by check from this main office to your order and deposited by our bakery plant in your bank.

Deposit Accounts

These accounts will be used for the deposit of monies received by our bakery plants against which there will be no checking authority except those checks which may be drawn by this main office and signed by the Treasurer or Assistant Treasurer and countersigned by the President or Vice President. Each day the bakery will deliver to your bank the deposit of monies received by them which should be credited to the General Baking Company's respective Deposit Accounts. Each day when delivering a deposit to your bank the bakery's representative will hand your representative a printed post card advice of deposit made which should be signed by you and mailed direct to the executive offices of the General Baking Company, 342 Madison Avenue, New York City.

On Monday of each week it is understood we will receive from you in cash funds the balance of the three deposit accounts as of the close of business the previous Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records.

We believe we have covered the principle subject of the operation of the accounts as mentioned above and if you find that any further explanation may be needed we would be very glad to hear from you.

Very truly yours,

H Clark

Treasurer

AAC.AC

Bond Bread

59-60

[fol. 61] EXHIBIT "C" TO AMENDED BILL

August 22, 1925.

Mr. A. A. Clarke, Treasurer, General Baking Company, 342 Madison Avenue, New York, N. Y.

DEAR SIR:

We believe the following represents a resume of the understanding arrived at between yourself and our Mr. Vance, and which will serve as a basis for the handling of your funds in Philadelphia and surrounding territory.

We will agree to collect your daily deposits from your Philadelphia plants, and deliver weekly payrolls in envelopes to these plants on such days and at such time that will be agreeable to the various managers of said plants. Wherever possible however, we trust that you can arrange for payroll delivery and collections to be made simultaneously.

We will also make up and ship by express payrolls for any of your out of town distributors wherever mutually agreed upon as being an economy to your organization.

It is our understanding that you now have, or contemplate opening distributors in the following places:

Norristown	Wildwood	Camden
Trenton	Pleasantville	Vineland
Ocean City	Clementon	Millville
Burlington	Wilmington	Bridgeton
Atlantic City	Berlin	Sea Isle City
Princeton	Chester	

We will make arrangements with banks of our selection in these different localities to enable your cashiers to make [fol. 62] their regular deposits, and will also care for any additions you may make to the above that come within the Philadelphia zone.

You are to send us a general letter of instructions covering detail of operation, at the time that you send us the usual and necessary certifications of signatures.

In consideration of the above it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies received from your Philadelphia plants and out of town dis-

tributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon.

The Disbursement Account is the active checking account for the benefit of the branches in Philadelphia. On Wednesday of each week you will send to this account approximately $25,000. for each of the three (3) plant disbursement accounts. You are to file with us authorized signatures of branch managers and assistant branch managers to cover this account, and it is also understood that in addition to such signatures we are to honor checks that may be drawn from time to time by the executive officers, signed by the Treasurer or Assistant Treasurer, and countersigned by the President or Vice-President.

In connection with the division of responsibility,—in the matter of putting up payrolls,—we assume all responsibil- [fol. 63] ity for errors or discrepancies in any of the envelopes and for the safe delivery of same up to the time it is received and signed for by your representative. In cases where we may ship payrolls by express to any of your out of town distributors, we assume all responsibility up to the time we deliver same to the express company for shipment. As to the collection of deposits,—we assume all responsibility for the safe transfer of all such funds from your plants to our Bank, such deposits to be opened and counted at our Main Office promptly, and any discrepancies found to be reported to you immediately.

Assuring you it is our earnest desire to serve you, we are

Very truly yours, —— ——, Vice-President & Treasurer.

SV:R.

[fol. 64] EXHIBIT "D" TO AMENDED BILL

September 9, 1925.

Mr. Samuel Vance, Jr., Franklin Trust Company, Philadelphia, Pa.

DEAR MR. VANCE:

I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer through the American Exchange-Pacific National Bank of $161,680.42. This transfer was not effected in cash funds, that is without further clearance as you advised me you would do.

On account of leaving the office early I had to postpone writing you until this morning as to the method of receipt by our New York depository. They advise me this morning that they were in receipt of cashier's check of the First National Bank, New York, for the amount as stated above which will not be cleared until this morning.

You will recall that during our conversation you advised me tentatively of your arrangement to transfer through your New York correspondent, The First National Bank and I at that time advised you that I thought it would be effected as it was effected by means of cashier's draft which had to be cleared after its receipt. You will recall that I did not suggest any means by which you could make transfer and allowed you to follow your own suggestions which I am still very pleased to do.

However, I would be pleased on future transfers to have you effect such in cash funds, in other words, without further clearance after its receipt on Monday of each week. [fols. 65-66] I note that it is your intention to be in New York tomorrow, Thursday, and would suggest that if possible you postpone your visit say for a day later as I will be more or less tied up in meetings.

With kindest regards, I am yours,

—— ——, Treasurer.

AAC-FHF.

(Here follows 1 photo, Exhibit "E", side folios 67-68)

4

EXHIBIT "E" TO AMENDED BILL

CAPITAL $ 1 500 000 SURPLUS $ 2 000

FRANKLIN TRUST COMPANY
OF PHILADELPHIA

FIFTEENTH AND CHESTNUT STREETS

ADDISON HARRIS JR. PRESIDENT
DAUPHINEE, VICE PRESIDENT & TREASURER
ARTHUR KITSON JR. VICE PRESIDENT & TRUST OFFICER
CRISPEN, SECRETARY & ASSISTANT TREASURER
CONRO, ASSISTANT TREASURER
DENNIS JONES, ASSISTANT SECRETARY
CARLE JARDEN, ASSISTANT TREASURER
ROBERT L. TABER, ASSISTANT SECRETARY
CHOLMELEY-JONES, ASSISTANT TREASURER
HARRY FERNAN, ASSISTANT TREASURER
HEATH, ASSISTANT TREASURER
STONEHILL, REAL ESTATE OFFICER

DAY AND NIGHT

WEST PHILA OFFICE
52nd & MARKET STS.
FRONT STREET OFFICE
FRONT & MARKET STS.
GERMANTOWN OFFICE
5708 GERMANTOWN AVE.
FRANKFORD OFFICE
FRANKFORD AVE & PAUL

PHILADELPHIA September 11th, 1925.

Exhibit E

Mr.A.A.Clarke, Treasurer,
General Baking Company,
342 Madison Avenue,
New York City, New York.

Dear Mr.Clarke:

Mr.Vance has handed me your letter of September 9th, advising that the transfer was not effected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

We have advised the First National today again that this transfer must be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr.Vance tells me that you understand the situation thoroughly and we appreciate your broad minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again.

With kind personal regards and looking forward to your trip to Philadelphia in the near future, I am

Very truly yours,

ABD-S. Vice President ~~and Treasu~~

67-68

[fol. 69] EXHIBIT "DD" TO AMENDED BILL

September 26th, 1925.

Mr. A. A. Clarke, Treasurer, General Baking Company,
342 Madison Ave., New York, N. Y.

MY DEAR MR. CLARKE:

In connection with the out-of-town collections, there is one condition that at first glance, will be rather confusing, but after it is once understood, and gets into operation, will cause no misunderstanding or difficulty. The cause for this thought lies in the fact that all deposits made in the out-of-town banks, most of which are made after regular banking hours, are credited by the local bank on the next day's business, but we do not receive advices of these deposits until the following day. In other words, a deposit made on a Monday night in the local bank, credited on Tuesday, advice received by us on Wednesday and is credited by us the same day.

Applying this thought to our weekly remittance, means that we can remit only on each Monday morning funds that have been credited on our books at the close of business on the previous Saturday, and this in turn means that the last out-of-town collection that will be included in the Monday remittance would be the one made on Thursday night, credited by the local bank on Friday and advice received by us on Saturday before the close of our books.

While this all appears complicated at first sight, it simply means that the first week's remittance will not be a full week, but thereafter you will receive a full week's collection from the out of town branches, which will include from [fol. 70] a Friday night until the following Thursday night of each previous week.

We will send you every Monday a detailed statement showing collections from all of these out-of-town agencies along with the usual weekly statement of the Philadelphia collections.

Trusting I have made myself clear and with kind personal regards, I am

Very truly yours, —— ——.

SV: H.

(Here follows 1 photo, Exhibit "EE", side folios 71-72)

GENERAL BAKING COMPANY

EXECUTIVE OFFICES

342 MADISON AVENUE

NEW YORK.

September 28, 1925.

33 PLANTS

BALTIMORE, MD.
BOSTON, MASS.
BROOKLYN, N. Y.
BUFFALO, N. Y.
CANTON, OHIO
CLEVELAND, OHIO
DETROIT, MICH.
HARTFORD, CONN.
JERSEY CITY, N. J.
NEWARK, N. J.
NEW HAVEN, CONN.
NEW YORK, N. Y.
NEW ORLEANS, LA.
NORFOLK, VA.
PHILADELPHIA, PA.
PROVIDENCE, R. I.
ROCHESTER, N. Y.
ST. LOUIS, MO.
SPRINGFIELD, MASS.
STEUBENVILLE, OHIO
SYRACUSE, N. Y.
TOLEDO, OHIO
WASHINGTON, D. C.
WATERBURY, CONN.
WHEELING, W. VA.

Mr. Samuel Vance, Jr.,
Franklin Trust Company,
15th & Chestnut Sts.,
Philadelphia, Pa.

Dear Sir:-

We have your letter of September 26th in the matter of out of town collections and note that you will remit on each Monday morning funds that have been credited on your books at the close of business on the previous Saturday, including the local deposits made up to Thursday night and credited by the local bank on Friday, which meets with our approval.

Very truly yours,

GENERAL BAKING COMPANY,

J. L. Dayhoff

Asst. Treasurer.

JLD-FF

Bond Bread

71-7

[fol. 73] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED BILL OF COMPLAINT AS AMENDED, OF JOHN J. SULLIVAN, SPECIAL DEPUTY, ON BEHALF OF WILLIAM D. GORDON, SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, A CORPORATION, AND ON HIS OWN BEHALF AS SPECIAL DEPUTY IN CHARGE—Filed December 29, 1932

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, by John J. Sullivan, Special Deputy as Agent, and John J. Sullivan, Special Deputy in charge, come and file this, their answer to the complainant's amended Bill, as amended, in the above matter, reserving the right of exception to the errors and uncertainties in the complainant's amended Bill, as amended, contained, and for answer thereto and to so much and such parts thereof as defendants, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy as Agent, are advised are material or necessary to answer, say:

1. The averments of fact in paragraph 1 of said amended Bill, as amended, are admitted to be true.

2. The averments of fact in paragraph 2 of said amended Bill, as amended, are admitted to be true.

3. The averments of fact in paragraph 3 of said amended Bill, as amended, are admitted to be true.

[fol. 74] 4. The defendants admit that an agreement was entered into between Franklin Trust Company and the complainant in August, 1925, under the terms and conditions as averred in plaintiff's amended Bill of Complaint, as amended, as qualified in this Answer.

5. The averments of fact in paragraph 5 of said amended Bill, as amended, are admitted to be true.

6. The averments of fact in paragraph 6 of said amended Bill, as amended, are admitted to be true.

7. The averments of fact in paragraph 7 of said amended Bill, as amended, are admitted to be true.

8. Your deponents qualify the averments of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

The facts alleged in sub-divisions A and B of paragraph 8 of the amended Bill of Complaint, as amended, are admitted. Defendants qualify the allegations in sub-division C of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a "deposit account" in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General [fol. 75] Baking Company in New York or its depository.

The defendants qualify sub-division D of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit advice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's "deposit account" in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City.

Defendants qualify sub-division E of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

Defendants have no knowledge that the agreement as therein set forth was entered into by the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material, demand proof thereof. Defendants aver, moreover, that the allegation that said contract was entered into for the sole [fol. 76] benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant.

Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in subdivision E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said "deposit account" and in the outlying banks, in accordance with the agreement of the parties as set forth in subdivisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which said funds were in the possession of Franklin Trust Company and/or the outlying banks, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein.

9. Defendants admit the averments of paragraph 9 of the amended Bill of Complaint, as amended, with the qualification that the banks therein listed were selected under the terms and conditions of the agreement set forth in paragraph 8 of the amended Bill of Complaint, as amended, as qualified in this Answer.

9A. Defendants admit that on September 9, 1925, the complainant wrote to the Franklin Trust Company, as set forth in Exhibit "D" attached to the amended Bill of Complaint, as amended, and that on September 11, 1925, the [fol. 77] Franklin Trust Company acknowledged receipt of

said letter, as set forth in Exhibit "E" attached to the amended Bill of Complaint, as amended.

10. The averments of fact in paragraph 10 of said amended Bill, as amended, are admitted to be true.

11. Defendants admit the facts contained in paragraph 11 of the amended Bill of Complaint, as amended, with the qualification that the terms and conditions of the agreement which were performed by the complainant and the Franklin Trust Company were those terms and conditions contained in the agreement as alleged in paragraph 8 of the amended Bill of Complaint, as amended, and as qualified herein.

12. Defendants admit the allegations in paragraph 12 of the amended Bill of Complaint, as amended, with the qualification that they deny that the funds deposited by the complainant, as therein alleged, were deposited at the special request and for the sole benefit of the Franklin Trust Company. Defendants further aver that, in accordance with the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, the General Baking Company authorized the Franklin Trust Company to retain and use all funds deposited by the General Baking Company in the Franklin Trust Company or in the outlying banks, whether deposited in the account known as "Deposit Account" or otherwise, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein.

13. Your deponents admit the facts alleged in subdivisions A, B, and C of paragraph 13 of the amended Bill of Com- [fol. 78] plaint, as amended. Defendants, in reply to subdivision D thereof, admit that the Franklin Trust Company continued to accept moneys from complainant's distributors in Philadelphia, the same to be deposited in the "deposit account" of the complainant and to be forwarded, on Monday and Wednesday of each week, to complainant in New York City or its depository; and for further answer as to the terms and conditions of the contract under which sum moneys were deposited, refer to their allegations in reply to sub-division C of paragraph 8 of the amended Bill of Complaint, as amended. Defendants, in reply to sub-division E of paragraph 13 of the amended Bill of Complaint, as

amended, admit that the correspondent banks selected by the Franklin Trust Company and approved by complainant continued to accept moneys deposited by complainant's distributors in the outlying banks, said funds to be remitted to Franklin Trust Company and credited to the General Baking Company's "deposit account," and the proceeds thereof to be forwarded on Monday and Wednesday of each week to complainant or its depository in New York City; but for further answer qualify the allegations as to the terms and conditions of the agreement entered into between complainant and Franklin Trust Company in the same manner as they have qualified, by their Answer, the allegations contained in sub-division D of paragraph 8 of complainant's amended Bill of Complaint, as amended.

In reply to sub-division F of paragraph 13 of the amended Bill of Complaint, as amended, defendants qualify the facts as therein alleged in the same manner that they have qualified in this Answer similar averments of facts in paragraph 8, sub-division E of the amended Bill of Complaint, as amended.

[fol. 79] 14. Defendants admit the allegations of paragraph 14 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to the agreement, as set forth in paragraph 13 of the amended Bill of Complaint, as amended, the defendants incorporate by reference their reply to said paragraph in this Answer, and with the further qualification that the defendants have no knowledge that the funds deposited with the Franklin Trust Company were so deposited at the oral request of the Franklin Trust Company, and if the same be material, defendants demand proof thereof.

15. Defendants admit the allegations of paragraph 15 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to certain clauses in sub-divisions D and E of paragraph 13 of the amended Bill of Complaint, as amended, paragraph 14, and paragraph 19 of the amended Bill of Complaint, as amended, the defendants incorporate by reference their reply to the corresponding paragraphs in this Answer.

16. Defendants admit the allegations in paragraph 16 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, sub-

division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

17. The averments of fact in paragraph 17 of said amended Bill, as amended, are admitted to be true.

18. The averments of fact in paragraph 18 of said amended Bill, as amended, are admitted to be true.

19. Defendants admit the allegations in paragraph 19 of the amended Bill of Complaint, as amended, with the quali- [fol. 80] fication that where reference is made to the agreement as set forth in paragraph 13, Clause E, of the amended Bill of Complaint, as amended, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

20. Defendants admit the allegations in paragraph 20 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, subdivision E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

21. Defendants admit the allegations in paragraph 21 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, subdivision D, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

22. The averments of fact in paragraph 22 of said amended Bill, as amended, are admitted to be true.

23. The averments of fact in paragraph 23 of said amended Bill, as amended, are admitted to be true.

24. It is admitted that cash, together with proceeds from the drafts and checks in the amount of $49,590.17, referred to in paragraph 21 of the amended Bill of Complaint, as amended, were mingled with the cash funds of the Franklin Trust Company without first obtaining complainant's specific consent or approval therefor. It is averred that by and under the terms and conditions of the agreement entered [fol. 81] into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer,

consent and approval were given by the General Baking Company to the Franklin Trust Company to divert said funds to and mingle said funds with the general funds of the Franklin Trust Company.

25. The averments of fact in paragraph 25 of said amended Bill, as amended, are admitted to be true.

26. The averments of fact in paragraph 26 of said amended Bill, as amended, are admitted to be true.

27. The averments of fact in paragraph 27 of said amended Bill, as amended, are admitted to be true.

28. The averments of fact in paragraph 28 of said amended Bill, as amended, are admitted to be true.

29. Defendants deny that the complainant is entitled to the equitable relief prayed for in paragraph 29 of the amended Bill of Complaint, as amended, for the reasons as herein set forth. For further answer, defendants aver that whatever rights may be possessed by the complainant herein cannot now be asserted in a separate proceeding, and defendants allege that the proceedings against the Franklin Trust Company, whereby and wherein the Secretary of Banking took possession of the same, having been instituted in the Court of Common Pleas No. 5 of Philadelphia County, as of September Term, 1931, No. 3941, the District Court of the United States for the Eastern District of Pennsylvania does not have jurisdiction to adjudicate and pass upon the facts and circumstances as alleged in the amended complainant's Bill in Equity, as amended. Deponents further [fol. 82] aver that whatever rights may be possessed by the complainant cannot be asserted prior to the audit and adjudication of the account of the Deputy in charge of the Franklin Trust Company of his administration and liquidation of the affairs of said company, at which time and place the complainant may appear and establish its rights in the manner provided by the laws of the Commonwealth of Pennsylvania. Defendants further aver that the facts and circumstances as alleged in the Bill of Complaint and qualified herein do not establish a trust relationship between the complainant and Franklin Trust Company as to the sum of $49,590.17 which was on deposit in the Franklin Trust Company at the date the Secretary of Banking took possession thereof, nor a trust relationship as to the sum of $32,403.26 which sum was collected by the correspondent banks

under the terms and conditions as set forth in the amended Bill of Complaint, as amended (as qualified herein), and was in their possession when the Secretary of Banking took possession of the business and property of the Franklin Trust Company, and is now held in escrow, pending the determination of this action. Defendants aver that under the law, as applied to the facts herein, the complainant is not entitled to a preferred claim against the estate of the Franklin Trust Company now being administered by the Secretary of Banking, but has merely the status of depositor and as such must present its claim at the audit of the account. Defendants further allege that, whatever relationship existed between the complainant and the Franklin Trust Company, the complainant is not entitled to a preferred claim at this time, and that no sums of money should be paid to the complainant until such time as the account of the Secretary of Banking in possession of the business and property of the Franklin Trust Company shall have been audited and the Court of Common Pleas No. 5 of Philadelphia County [fol. 83] shall have ordered distribution of the funds accounted for therein.

Defendants further aver that the complainant has an adequate remedy at law and therefore is not entitled to equitable relief in the premises, and pray that the amended Bill of Complaint, as amended, may be dismissed, with their reasonable costs and charges in this behalf sustained.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Company, by John J. Sullivan.

Duly sworn to by John J. Sullivan. Jurat omitted in printing.

[fol. 84] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 20, 1933

To the Honorable, the Judges of the Said Court:

Plaintiff requests the Court to make the following:

Findings of Fact

1. The plaintiff is the General Baking Company, a New York corporation, with principal offices and place of busi-

ness in New York City, New York. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in the Answer thereto, Paragraph 1.)

2. The defendants are William D. Gordon, Secretary of the Pennsylvania Department of Banking, and John J. Sullivan, Special Deputy. (Amended Bill of Complaint as Amended, Paragraph 2, admitted in the Answer thereto, Paragraph 2.)

3. Defendants, at the end of the business day of October 5, 1931, closed and took possession and control of the business and property of the Franklin Trust Company, a Pennsylvania banking corporation, with principal office and place of business at Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 2, admitted in the Answer thereto, Paragraph 2.)

4. The amount in this controversy is in excess of $3000, exclusive of interest and costs, and the parties involved are citizens of different states of the United States. (Amended Bill of Complaint as Amended, Paragraph 3, admitted in the Answer thereto, Paragraph 3.)

[fol. 85] 5. Plaintiff, at the times involved in this suit, sold and distributed bread, cakes and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)

6. Plaintiff, at the times involved in this suit, owned and operated thirty-two plants throughout the United States, in the following cities: Baltimore, Maryland; Boston, Massachusetts; Brooklyn, New York; Buffalo, New York; Canton, Ohio; Cleveland, Ohio; Detroit, Michigan; Hartford, Connecticut; Jersey City, New Jersey; Newark, New Jersey; New Haven, Connecticut; New York, New York; New Orleans, Louisiana; Norfolk, Virginia; Philadelphia, Pennsylvania; Providence, Rhode Island; Rochester, New York; St. Louis, Missouri; Springfield, Massachusetts; Steubenville, Ohio; Syracuse, New York; Toledo, Ohio; Washington, District of Columbia; Waterbury, Connecticut; Wheeling, West Virginia. (Amended Bill of Complaint as Amended, Exhibits "B" and "EE.")

7. Plaintiff's main place of business and main bank depository, at the times involved, were in New York City. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)

8. In June, 1925, the Franklin Trust Company sought to enter into an agreement with plaintiff providing for the acceptance by it of cash, checks and drafts from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, for the purpose of forwarding the cash, together with the [fol. 86] proceeds of the checks and drafts, to plaintiff, in New York City. (Amended Bill of Complaint as Amended, Paragraph 4, admitted in the Answer thereto, Paragraph 4.)

9. On June 13, 1925, plaintiff received a letter from the Franklin Trust Company dated June 12, 1925, a copy of which is appended hereto, marked Exhibit "A." (Amended Bill of Complaint as Amended, Paragraph 5, admitted in the Answer thereto, Paragraph 5.)

10. On August 20, 1925, plaintiff sent a letter to the Franklin Trust Company, a copy of which is appended hereto, marked Exhibit "B." (Amended Bill of Complaint as Amended, Paragraph 6, admitted in the Answer thereto, Paragraph 6.)

11. On August 24, 1925, plaintiff received a letter from the Franklin Trust Company, dated August 22, 1925, a copy of which is appended hereto, and marked Exhibit "C." (Amended Bill of Complaint as Amended, Paragraph 7, admitted in the Answer thereto, Paragraph 7.)

12. On August 25, 1925, plaintiff entered into an oral agreement with the Franklin Trust Company with respect to the acceptance of cash, drafts and checks by it from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 8, admitted in the Answer thereto, Paragraph 8.)

13. The terms and provisions of said oral agreement of August 25, 1925, were:

(a) Plaintiff would open a checking account with the Franklin Trust Company and maintain an average balance

[fol. 87] of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account."

(b) On Wednesday of each week, plaintiff would forward, from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to plaintiff, or its depository, in New York City; said account to be known as a "Deposit Account."

(d) The Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of plaintiff; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and [fol. 88] the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to plaintiff, or its depository in New York City.

(e) The plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint as Amended, Paragraph 8.)

14. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff would open a checking account, to be known as the "Disbursement Account," with the Franklin Trust Company, and maintain an average balance of not less than $25,000 therein, by forwarding a sum sufficient therefor, on Wednesday of each week, direct from its New York office to the Franklin Trust Company, interest to be paid on this account at the rate of 2 per cent. per annum. (Amended Bill of Complaint as Amended, Paragraph 8, clauses (a) and (b), admitted in the corresponding clauses of Paragraph 8 of the Answer thereto.)

15. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company would accept, from plaintiff's distributors in Philadelphia, cash, also [fol. 89] checks and drafts for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week, to plaintiff or its depository in New York City; said account to be known as the "Deposit Account." (Amended Bill of Complaint as Amended, Paragraph 8, clause (c), admitted in the corresponding clause of Paragraph 8 of the Answer thereto.)

16. The said oral agreement of August 25, 1925, did not provide for the payment of interest by the Franklin Trust Company upon the cash, together with the proceeds from the drafts and checks, accepted by it from plaintiff's distributors for forwarding to plaintiff in New York City. (Amended Bill of Complaint as Amended, Paragraph 8.)

17. The said oral agreement of August 25, 1925, did not permit the Franklin Trust Company to intermingle the funds in plaintiff's Disbursement Account and Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)

18. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d).)

19. The said oral agreement of August 25, 1925, provided, inter alia, that a written acknowledgment of the receipt of said cash, drafts and checks, by each of the said correspond-
[fol. 90] ent banks, would be mailed to plaintiff in New York City immediately upon receipt thereof, and a credit advice sent to the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), admitted in the corresponding clause of Paragraph 8 of the Answer thereto.)

20. The said oral agreement of August 25, 1925, provided, inter alia, that the purpose of the Deposit Account was the handling of daily collections, all moneys received from the Philadelphia plants and out-of-town distributors to be put into this account, and on Monday morning of each week to be transferred either through the Federal Reserve, or New York correspondent bank of the Franklin Trust Company, so that cash funds to the amount of the weekly collections would be to plaintiff's credit by every Monday at three o'clock in the afternoon. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), and Exhibit "C," Page 2, Paragraph 2.)

21. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company, allowing it to use for specified periods of time certain sums from those accepted by it for forwarding to plaintiff, or its depository, in New York City, these sums to be called by plaintiff's check. (Amended Bill of Complaint as Amended, Paragraph 8, clause (e).)

22. The said oral agreement of August 25, 1925, provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City, were never to be
[fol. 91] subject to check, except in those instances where special agreements were entered into between the parties for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint, as Amended, Paragraph 8, clause (e).)

23. The said oral agreement of August 25, 1925, did not provide that the Franklin Trust Company have a right to use the cash, together with proceeds of drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)

24. The clerical work necessitated of the Franklin Trust Company, by the Disbursement Account and the Deposit Account, under said oral agreement of August 25, 1925, was negligible in comparison with that required in the usual checking account.

25. The Franklin Trust Company, pursuant to the terms of said oral agreement of August 25, 1925, selected, with the approval of plaintiff, the following banks in New Jersey, Delaware, and Eastern Pennsylvania, as corresponding banks:

The First Mechanics National Bank of Trenton, Trenton, New Jersey;

West Jersey Trust Company, Parkside Branch, Camden, New Jersey;

The First National Bank, Pleasantville, New Jersey;

Delaware County National Bank, Chester, Pennsylvania;

National Bank of Chester Valley, Coatesville, Pennsylvania;

The Wayne Title & Trust Company, Wayne, Pennsylvania;

Wilmington Trust Company, Wilmington, Delaware;

[fol. 92] The Allentown National Bank, Allentown, Pennsylvania;

Farmers National Bank and Trust Company, Reading, Pennsylvania.

(Amended Bill of Complaint as Amended, Paragraph 9, admitted in Paragraph 9 of the Answer thereto.)

26. On September 9, 1925, plaintiff wrote the Franklin Trust Company a letter, a copy of which is appended hereto, marked Exhibit "D." Said letter stated, inter alia:

"I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer through the American Exchange-Pacific National Bank of

$161,680.42. This transfer was not effected in cash funds, that is without further clearance as you advised me you would do.

* * * * * * *

"You will recall that during our conversation you advised me tentatively of your arrangement to transfer through your New York correspondent, The First National Bank and I at that time advised you that I thought it would be effected as it was effected by means of a cashier's draft which had to be cleared after its receipt. You will recall that I did not suggest any means by which you could make transfer and allowed you to follow your own suggestions which I am still very pleased to do.

"However, I would be pleased on future transfers to have you effect such in cash funds, in other words, without further clearance after its receipt on Monday of each week."

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)

27. On September 12, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 11, [fol. 93] 1925, a copy of which is appended hereto, marked Exhibit "E." Said letter stated, inter alia:

"Mr. Vance has handed me your letter of September 9th, advising that the transfer was not effected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

"We have advised the First National today again that this transfer *must* be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr. Vance tells me that you understand the situation thoroughly and we appreciate your broad-minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again."

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)

28. On September 27, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 26, 1925, a copy of which is appended hereto, marked Exhibit 'DD.'' Said letter contained the following:

''In connection with the out-of-town collections * * * all deposits made in the out-of-town banks * * * are credited by the local bank on the next day's business, but we do not receive advices of these deposits until the following day. In other words, a deposit made on Monday night in the local bank, credited on Tuesday, advice received by us on Wednesday and is credited by us the same day. * * *

[fol. 94] '' * * * you will receive a full week's collection from the out-of-town branches, which will include from a Friday night until the following Thursday night of each previous week.''

(Amended Bill of Complaint as Amended, Paragraph 10, admitted in Paragraph 10 of the Answer thereto.)

29. On September 28, 1925, plaintiff sent a letter to the Franklin Trust Company, a copy of which is appended hereto, marked Exhibit ''EE.'' (Amended Bill of Complaint as Amended, Paragraph 10, admitted in Paragraph 10 of the Answer thereto.)

30. From August, 1925, until August, 1930; the plaintiff and the Franklin Trust Company performed all the terms and conditions of said oral agreement of August 25, 1925. (Amended Bill of Complaint as Amended, Paragraph 11, admitted in Paragraph 11 of the Answer thereto.)

31. Pursuant to the provisions of said oral agreement of August 25, 1925, plaintiff, at the special request and for the sole benefit of the Franklin Trust Company, entered into separate and distinct oral agreements with it, allowing it to use certain funds from the Deposit Account for specified periods of time. The approximate dates of said agreements, the total sums, and the dates when called by plaintiff's checks follow:

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
[fol. 95] Called by three checks:		
One dated March 29, 1928	$140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	200,000.00	440,000.00
June, 1928		$100,000.00
Called by check dated June 29, 1928	100,000.00	100,000.00

(Amended Bill of Complaint, as Amended, Paragraph 12.)

32. The sums which the plaintiff permitted the Franklin Trust Company to segregate from its Deposit Account, and use, were called at the expiration of the specified periods of time by plaintiff's checks.. (Amended Bill of Complaint, as Amended, Paragraph 12, admitted in Paragraph 12, of the Answer thereto.)

33. In August, 1930, plaintiff and the Franklin Trust Company orally agreed to, and did, modify their oral agreement of August 25, 1925, (Amended Bill of Complaint, as Amended, Paragraph 13, admitted in Paragraph 13 of the Answer thereto.)

34. The terms and provisions of said modified agreement of August, 1930, were:

(a) That plaintiff would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000. therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

[fol. 96] (c) That on Wednesday of each week plaintiff would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an

average balance of not less than $25,000.00 in said checking account;

(d) That said Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff or its depository, in New York City; said account to continue to be known as a "Deposit Account."

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by plaintiff, would continue to accept, from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as plaintiff's funds; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday and Wednesday of each week, to plaintiff, or its depository, in New York City.

[fol. 97] (f) That plaintiff might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint, as Amended, Paragraph 13.)

35. The said modified agreement of August, 1930, provided, inter alia, that plaintiff would continue a checking account, to be known as the "Disbursement Account," with

the Franklin Trust Company, and maintain an average balance of not less than $25,000. therein, by forwarding a sum sufficient therefor on Wednesday of each week, direct from its New York office to the Franklin Trust Company, interest no longer to be paid on this account. (Amended Bill of Complaint, as Amended, Paragraph 13, clauses (a), (b), and (c), admitted in the corresponding clauses of Paragraph 13 of the Answer thereto.)

36. The said modified agreement of August, 1930, provided, inter alia, that the Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff, or its depository, in New York City; said [fol. 98] account to be known as the "Deposit Account." (Amended Bill of Complaint, as Amended, Paragraph 13, clause (d), admitted in corresponding clause of Paragraph 13 of the Answer thereto.)

37. The said modified agreement of August, 1930, provided, inter alia, that the correspondent banks in neighboring towns and cities in New Jersey, Delaware and eastern Pennsylvania, selected by the Franklin Trust Company and approved by plaintiff, would continue to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject only to the check of, the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 13, clause (e).)

38. The said modified agreement of August, 1930, provided, inter alia, that the correspondent banks would continue to mail immediately to plaintiff in New York City a written acknowledgment of the receipt of said cash, drafts and checks and send a credit advice thereof to the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 13, clause (e), admitted in corresponding clause of Paragraph 13 of the Answer thereto.)

40. The said modified agreement of August, 1930, provided, inter alia, that plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, continue to enter into separate and distinct oral agreements with the Franklin Trust Company, al-

lowing it to use for specified periods of time certain sums from those accepted by it for forwarding to plaintiff, or its depository, in New York City, on Monday of each week, these sums to be called by plaintiff's check. (Amended Bill of Complaint as Amended, Paragraph 13, clause (f).)

[fol. 99] 41. The said modified agreement of August, 1930 provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City were never to be subject to check, except in those instances where special agreements were entered into between the parties for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint, as Amended, Paragraph 13, clause (f).)

42. The said oral agreement of August, 1930, did not provide that the Franklin Trust Company have a right to use the cash, together with the proceeds of the drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 13.)

43. The ultimate destination of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks, from plaintiff's distributors, was the plaintiff's depository in New York City. (Amended Bill of Complaint as Amended, Exhibits "B" and "C.")

44. The ultimate destination of the cash, together with the proceeds of drafts and checks, accepted by the Franklin Trust Company from plaintiff's distributors in Philadelphia, was plaintiff's depository in New York City.

45. From August, 1930, until October 5, 1931, plaintiff performed all of its obligations under the terms and provisions of said modified agreement of August, 1930. (Amended Bill of Complaint as Amended, Paragraph 14, admitted in Paragraph 14 of the Answer thereto.)

46. Pursuant to the terms and provisions of said modified agreement of August, 1930, plaintiff, at the oral request and for the sole benefit of the Franklin Trust Company, agreed to, and did, allow it to use cash, together with [fol. 100] proceeds of drafts and checks, accepted for forwarding to plaintiff in New York City, during September and part of November, 1930, totaling $100,000, which were called by plaintiff's check, dated November 18, 1930, in the amount of $100,000. (Amended Bill of Complaint as Amended, Paragraph 14.)

47. The Franklin Trust Company, in accordance with the terms and provisions of said modified agreement of August, 1930, delivered in cash on Monday and Wednesday of each week the entire amount of cash, together with the proceeds of the checks and drafts, during the period, August, 1930, to September 30, 1931, except the said $100,000, which plaintiff permitted the Franklin Trust Company to use. (Amended Bill of Complaint as Amended, Paragraph 15, admitted in Paragraph 15 of the Answer thereto.)

48. The plaintiff dealt directly with the correspondent banks with respect to all uncollectible drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 16.)

49. Plaintiff delivered to the correspondent banks the following drafts, cash and checks, for the forwarding of the cash, together with the proceeds of the drafts and checks, to plaintiff, or its depository, in New York City, on the dates and in the amounts specified:

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less Returned Check			20.85
			$30,486.16

[fol. 101] (Amended Bill of Complaint as Amended, Paragraph 16, admitted in Paragraph 16 of the Answer thereto.)

50. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks received on October 3 and 5, 1931, and credit advices thereof were received by the Franklin Trust Company on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 17, admitted in Paragraph 17 of the Answer thereto.)

51. The checks and drafts delivered to the correspondent banks by plaintiff, on October 3 and 5, 1931, were not collected by them until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 18, admitted in Paragraph 18 of the Answer thereto.)

52. On September 26, 1931, plaintiff delivered cash, also drafts and checks, in the amount of $1,917.10, to the Wil-

mington Trust Company, Wilmington, Delaware, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company in Philadelphia, for forwarding to the plaintiff, or its depository, in New York City. (Amended Bill of Complaint as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)

53. Advice of the receipt of said sum of $1,917.10 by the Wilmington Trust Company was not received by the Franklin Trust Company until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)

54. The total amount of cash, drafts and checks delivered by plaintiff to the correspondent banks on September 26, [fol. 102] October 2, 3, and 5, 1931, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company, to be forwarded by it to plaintiff, or its depository, in New York City, was $32,403.26. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)

55. The said sum of $32,403.26 was in the possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow, under order of this court and agreement of counsel, pending the determination of this court as to whom it should be paid. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)

56. Plaintiff delivered to the Franklin Trust Company in Philadelphia, for the purpose of forwarding to plaintiff, or its depository in New York City, the cash, checks and drafts, on the dates and in the amounts as follows:

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17

(Amended Bill of Complaint as Amended, Paragraph 21, admitted in Paragraph 21 of the Answer thereto.)

57. The drafts and checks in the amount of $8,747.50, delivered by plaintiff to the Franklin Trust Company on Oc-
[fol. 103] tober 3, 1931, were not collected by it until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 22, admitted in Paragraph 22 of the Answer thereto.)

58. The Franklin Trust Company did not, as it promised in said modified agreement of August, 1930, forward to plaintiff, or its depository, in New York City, on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03, delivered to it on October 3, 1931, or a total cash sum of $40,642.67. (Amended Bill of Complaint as Amended, Paragraph 23, admitted in Paragraph 23 of the Answer thereto.)

59. The cash together with the proceeds of the drafts and checks, in the amount of $49,590.17, were diverted to, and mingled with, the cash funds of the Franklin Trust Company, without plaintiff's specific consent or approval. (Amended Bill of Complaint as Amended, Paragraph 24, admitted in Paragraph 24 of the Answer thereto.)

60. The cash funds of the Franklin Trust Company were augmented to the extent of $49,590.17 by plaintiff's delivery to the Franklin Trust Company of the said cash, drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 25, admitted in Paragraph 25 of the Answer thereto.)

61. The cash funds of the Franklin Trust Company have been at all times since its acceptance from plaintiff of said cash, drafts and checks, and now are, in excess of the total amount of said cash and the proceeds of said drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 26, admitted in Paragraph 26 of the Answer thereto.)

[fol. 104] 62. There were, and now are, assets of the Franklin Trust Company, in the possession and control of the defendants, sufficient to pay plaintiff and all other preferred claimants in full. (Amended Bill of Complaint as Amended, Paragraph 27, admitted in Paragraph 27 of the Answer thereto.)

63. The correspondent banks were the agents of plaintiff.

64. The Franklin Trust Company did not purchase from plaintiff the drafts and checks accepted for the purpose of collection and forwarding the proceeds thereof to plaintiff, or its depository, in New York City.

65. October 4, 1931, was Sunday.

Conclusions of Law

1. The acceptance by the Franklin Trust Company, from plaintiff's distributors in Philadelphia, of the cash, also the drafts and the checks for collection, for the purpose of forwarding and delivering the cash, together with the proceeds of the drafts and checks, amounting to $49,590.17, to the plaintiff in New York City, created an express trust thereof.

2. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $49,590.17, accepted by the Franklin Trust Company from plaintiff's distributors, on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.

3. There was an equitable assignment to plaintiff of cash funds in the possession of the Franklin Trust Company in the amount of $40,642.67.

[fol. 105] 4. Plaintiff has an equitable lien on the fund of $49,590.17, in defendants' possession, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company, on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.

5. Plaintiff is entitled to a lien upon the assets of the Franklin Trust Company, now in possession and control of the defendants, to the extent of $49,590.17, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.

6. Upon the failure of the Franklin Trust Company, on October 5, 1931, to forward and deliver to plaintiff the cash sum of $40,642.67, which was accepted by the Franklin

Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City, on October 5, 1931, the Franklin Trust Company became trustee ex maleficio thereof.

7. Full title to, and ownership of, the drafts and checks, amounting to $9,753.18, delivered by plaintiff's distributors on October 2 and 3, 1931, for collection by the Franklin Trust Company, for the purpose of forwarding and delivering the proceeds thereof to plaintiff in New York, remained in plaintiff until the same were collected by defendants on or after October 6, 1931.

8. The Franklin Trust Company was not a purchaser for value of any of the drafts and checks, amounting to $9,753.18, delivered to it for collection by plaintiff's distributors on October 2 and 3, 1931.

[fol. 106] 9. The collection by defendants of the proceeds of the drafts and checks, delivered by plaintiff's distributors to the Franklin Trust Company, on October 2 and 3, 1931, in the amount of $8,747.50, and their subsequent failure to forward and deliver the proceeds to plaintiff in New York City, constituted the defendants trustees ex maleficio for that amount.

10. Under Section 13 of the Pennsylvania Act of June 12, 1931, P. L. 572, plaintiff has a right to the immediate payment of $8,747.50, the proceeds of drafts and checks accepted by the Franklin Trust Company for collection and collected by defendants subsequent to the closing of the Franklin Trust Company.

11. The plaintiff is entitled to immediate payment of said trust funds, in the amount of $49,590.17, with interest, out of the cash funds of the Franklin Trust Company.

12. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were not branch banks of the Franklin Trust Company.

13. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were the agents of plaintiff.

14. The acceptance from plaintiff's agents by the correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania, of cash, also drafts and checks for collection, for the purpose of crediting the same to the Franklin Trust

Company in Philadelphia, for forwarding and delivering the cash, together with the proceeds of the checks and drafts, amounting to $32,403.26, to plaintiff in New York City, [fol. 107] created an express trust thereof.

15. Plaintiff is entitled to the immediate payment of said trust funds in the amount of $32,403.26, with accrued interest thereon.

16. Plaintiff has an equitable lien upon the fund of $32,-403.26, now held in escrow, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks on September 26, October 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company.

17. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $32,403.26, accepted by the correspondent banks from plaintiff's distributors on September 26, October 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company.

18. Full title to, and ownership of the drafts and checks, amounting to $7,163.38, delivered by plaintiff's agents to the correspondent banks on October 2, 3 and 5, 1931, for collection, remained in plaintiff until the same were collected by the correspondent banks on or after October 6, 1931.

19. Neither the correspondent banks nor the Franklin Trust Company was a purchaser for value of said drafts and checks delivered to the former on October 2, 3, and 5, 1931.

20. This Court has jurisdiction of the subject matter of, and the parties to, this suit.

[fol. 108] 21. The defendants are liable for the payment of the costs of this litigation.

Respectfully requested, Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Plaintiff.

Exhibits "A", "B", "C", "D", "DD", "E" and "EE", Attached to Plaintiff's Requests for Findings of Fact and Conclusions of Law

The same as Exhibits "A", "B", "C", "D", "DD", "E" and "E" presented as part of the amended Bill of Complaint as Amended (Filed December 6, 1932) and printed side folios 55 to 72 of this Record.

[fol. 109] IN UNITED STATES DISTRICT COURT

OPINION SUR REARGUMENT—Filed June 8, 1933

KIRKPATRICK, J.:

The amendments allowed by the Court do not affect the issues presented by the original pleadings as the Court understood them. The amendments were allowed so that parties might not be prejudiced upon appeal by averments which they felt might cause misunderstanding. The Court however in deciding the case took the averments of paragraph 24 of the bill and corresponding paragraph of the answer to mean that the mingling of the specific funds in controversy was admitted to have taken place without the specific or express consent or approval of the plaintiff, but the Court was of the opinion that the original agreement contemplated the use by the Trust Company in its general business of all funds deposited and of necessity authorized their commingling with its other general funds.

Upon the re-argument the plaintiff strongly insisted that the Court accepted as a basis for its decision numerous averments in the answer which were no more than conclusions of law or "averments of defendants' interpretation of the exhibits and of the oral contract". This calls for a brief re-examination of the issues, keeping in mind the elementary proposition that upon hearing of bill and answer "the whole answer is to be taken as true; or in other words, the truth of all the well pleaded averments of the answer, whether responsive to the allegations of the bill or in avoidance thereof is admitted, the cause in effect being submitted to the court on the contention that plaintiff is entitled to the [fol. 110] decree prayed for in his bill upon the admissions

and notwithstanding the denials of the answer." 21 C. J. 560.

Now the agreement upon which the plaintiff bases its right, according to the bill, was an oral agreement subsequently orally modified in one or two particulars. It is averred that certain letters passed between the parties and these letters may be considered as evidence bearing upon the intention of the parties in the oral agreement. But there is no averment that the letters were intended as an integration of the agreement and it is obvious that they were not. For the terms of the oral agreement the Court must look to the answer and only such allegations of the bill with regard to the terms as are not denied or modified by the allegations of the answer may be added thereto. Of course, the Court understands that this does not extend to matters of opinion or inference or conclusions of law contained in the answer. But we are dealing with an oral agreement as to which it is not expected that the precise words will be set forth. So that, when the answer says that the parties agreed orally to certain things, unless it clearly appears that these averments are conclusions of law or mere inferences, they must be taken at their face value, namely as statements that, as matters of fact, the parties used the words substantially in accordance with the averment of the answer. If an answer states that "the defendant orally agreed to pay $1000 for an automobile" that is not stating a legal conclusion or inference but is stating a fact.

Now the really vital part of the oral agreement is stated in paragraph 8, sub-section (c) of the bill and the answer to that is as follows "* * * General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia [fol. 111] plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository." It is true that this same paragraph of the

answer refers to the letters passing between the parties ("the exhibits to the amended bill of complaint as amended") but there is no averment or suggestion that these letters constituted the agreement. On the contrary, the statement is that the agreement was oral and the letters are clearly referred to me as evidentiary of the intention of the parties.

The general rule is too well settled to admit of question that in the absence of any special agreement providing for a trust or agency a deposit in a bank to be credited to the depositor creates the relationship of a debtor and creditor. It is agreed of course that this was not an ordinary deposit but that it was made under a special agreement of some kind. Whether it was the purpose of this special agreement to create a trust relationship or whether it was merely to provide certain incidents as to transmission of balances, receipts of deposits, making up pay-rolls, etc., for the convenience of the parties was the matter at issue. The Court did not exclude the letters from its consideration but carefully considered all their terms, as though they had been incorporated into the oral agreement, or as though the agreement had been partly oral and partly written. The Court is still of the opinion that the evidence before it fails to show any intention to deny to the Trust Company the [fol. 112] right to use the funds deposited with it in what was called the deposit account.

The plaintiff has made the point as to the sum of $40,642.67 deposited with the Trust Company on Saturday, October 3, that regardless of any general arrangement, a trust arises because (a) the Trust Company was obligated to deliver this amount in cash to the plaintiff's depository in New York on Monday, October 5, and failed to do so. This argument however only goes to the general intention of the parties. If I thought that the letters relied upon by the plaintiff of September 9 and 11, 1925, meant that the Trust Company was bound to deliver to the plaintiff's depository in New York the identical currency, bills and coin received by it, I would have to revise my view as to the major intention of the parties in the whole transaction. This however was certainly never intended. Nor do I think that there was any intention that currency in specie was to be physically transported from the Trust Company's New York correspondent to the plaintiff's New York de-

pository. The letters of September 9, and 25 refer to "cash funds" and "current funds". All that the plaintiff is insisting upon is that banking arrangements be made so that the amount of money reaching the Trust Company's New York correspondent on Monday be in its depository available to be drawn upon by the afternoon of the same day. The plaintiff objected to the use of cashier's checks on the Trust Company's New York correspondent because they had to be cleared and consequently could not be drawn upon on the same day. Any arrangement which would make the credit balance available on Monday was satisfactory to the plaintiff. I find nothing in this correspondence inconsistent with the intention that the deposit while in the Trust Company's hands should be used for its general banking purposes.

[fol. 113] There are also cases of course which hold that in the absence of any trust agreement, the receipt by a bank of deposits at a time when it knows it is insolvent will create a trust ex maleficio (Ellerbe v. Studebaker Corporation, 21 F. (2d) 993). The trouble with this position is that there is nothing in the bill and answer from which the Court can find that the Trust Company was insolvent on October 3, or at any time prior to the closing of its doors on October 5.

Nor can a trust be implied from the failure of the Trust Company to pay the amount of deposits which it had on hand to the plaintiff's New York depository on Monday, October 5. If the original agreement did not contemplate or create a trust the fact that it has been broken will not accomplish that result. Otherwise any general depositor could turn his general deposit into a trust merely by presenting a check and having payment refused. If the relationship was that of debtor and creditor, the fact that the debtor failed to pay in accordance with the terms of the agreement does not constitute it a trustee.

The Court has carefully considered all the arguments presented in the plaintiff's comprehensive and well-considered brief but adheres to the views expressed in the original opinion and reaffirms the order for the dismissal of the bill.

By the Court.

W. H. Kirkpatrick, J.

[fol. 114] IN UNITED STATES DISTRICT COURT

DECREE—Filed September 8, 1933

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That plaintiff's bill in equity be dismissed, with costs to be paid by plaintiff.

By the Court.

Kirkpatrick, J.

June 14, 1933.

[fol. 115] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed September 5, 1933

To the Honorable, the Judges of the Said Court:

Comes now the above-named plaintiff, the appellant herein, by its attorneys of record and assigns as error upon which it will rely the following errors as having intervened in the record, proceedings and decree of the United States District Court for the Eastern District of Pennsylvania, in the above-entitled cause, to wit:

1. The Learned Chancellor erred in finding as a fact that:

"The Trust Company undertook to make up and deliver weekly payrolls in envelopes to the Philadelphia plants, collecting the deposits at the same time, when possible." (Opinion sur Pleadings and Proof.)

2. The Learned Chancellor erred in finding as a fact that:

"The disbursement account was not subject to check, except that the original agreement contemplated that the parties might, from time to time, specially agree to permit the balances in the disbursement account to remain in the Trust Company for longer than semi-weekly periods, in which case at the expiration of such agreed time the funds would be called by check of the plaintiff instead of being sent to it in the usual way." (Opinion sur Pleadings and Proof.)

3. The Learned Chancellor erred in finding as a fact that:

"The parties contemplated and actually made subsequent arrangements by which large amounts of money in [fol. 116] the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to changing the character of the deposit or the relationship created thereby. * * *" (Opinion sur Pleadings and Proof.)

4. The Learned Chancellor erred in finding as a fact that:

"The general arrangement is not unusual in the case of chain stores and the like, which do their principal banking in one city but have branch stores, which take in large amounts of money, in other places." (Opinion sur Pleadings and Proof.)

5. The Learned Chancellor erred in finding as a fact that:

"Besides supplying its banking facilities for transmission of the plaintiff's money to New York, it undertook the physical work of making the plaintiff's deposits both in Philadelphia and the surrounding territories, as well as that of making up and delivering the plaintiff's payrolls in Philadelphia." (Opinion sur Pleadings and Proof.)

6. The Learned Chancellor erred in finding as a fact that:

"The plaintiff in New York received immediate credit advices of all deposits made to its credit in the deposit account and, probably at once, credited them to its general funds in New York, and there may have been a number of reasons why it was convenient and desirable for it to keep this account intact for semi-weekly remittances." (Opinion sur Pleadings and Proof.)

7. The Learned Chancellor erred in finding as a fact that Sub-Section C, paragraph 8, of the amended answer read: [fol. 117] " * * * General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants

of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository." (Opinion sur Re-Argument.)

8. The Learned Chancellor erred in finding as a fact that:

"There is no averment or suggestion that these letters [exhibits to the amended bill of complaint, as amended] constituted the agreement." (Opinion sur Re-Argument.)

9. The Learned Chancellor erred in refusing to affirm plaintiff's fifth request for finding of fact. The request and ruling thereon are as follows:

"5. Plaintiff, at the times involved in this suit, sold and distributed bread, cakes and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware, and Eastern Pennsylvania. (Amended Bill of Complaint as amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)"

The Court ignored the above request.

10. The Learned Chancellor erred in refusing to affirm plaintiff's sixth request for finding of fact. The request and ruling thereon are as follows:

[fol. 118] "6. Plaintiff, at the times involved in this suit, owned and operated thirty-two plants throughout the United States, in the following cities: Baltimore, Maryland; Boston, Massachusetts; Brooklyn, New York; Buffalo, New York; Canton, Ohio; Cleveland, Ohio; Detroit, Michigan; Hartford, Connecticut; Jersey City, New Jersey; Newark, New Jersey; New Haven, Connecticut; New York, New York; New Orleans, Louisiana; Norfolk, Virginia; Philadelphia, Pennsylvania; Providence, Rhode Island; Rochester, New York; St. Louis, Missouri; Springfield, Massachusetts; Steubenville, Ohio; Syracuse, New York; Toledo, Ohio; Washington, District of Columbia;

Waterbury, Connecticut; Wheeling, West Virginia. (Amended Bill of Complaint as Amended, Exhibits 'B' and 'EE.')."

The Court ignored the above request.

11. The Learned Chancellor erred in refusing to affirm plaintiff's seventh request for finding of fact. The request and ruling thereon are as follows:

"7. Plaintiff's main place of business and main bank depository, at the times involved, were in New York City. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)"

The Court ignored the above request.

12. The Learned Chancellor erred in refusing to affirm plaintiff's eighth request for finding of fact. The request and ruling thereon are as follows:

"8. In June, 1925, the Franklin Trust Company sought to enter into an agreement with plaintiff providing for the acceptance by it of cash, checks and drafts from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware, and Eastern Pennsylvania, for the purpose of forwarding the cash, together with the [fol. 119] proceeds of the checks and drafts, to plaintiff, in New York City. (Amended Bill of Complaint as Amended, Paragraph 4, admitted in the Answer thereto, Paragraph 4.)"

The Court ignored the above request.

13. The Learned Chancellor erred in refusing to affirm plaintiff's ninth request for finding of fact. The request and ruling thereon are as follows:

"9. On June 13, 1925, plaintiff received a letter from the Franklin Trust Company dated June 12, 1925, a copy of which is appended hereto, marked Exhibit 'A'. (Amended Bill of Complaint as Amended, Paragraph 5, admitted in the Answer thereto, Paragraph 5.)"

The Court ignored the above request.

14. The Learned Chancellor erred in refusing to affirm plaintiff's tenth request for finding of fact. The request and ruling thereon are as follows:

"10. On August 20, 1925, Plaintiff sent a letter to the Franklin Trust Company, a copy of which is appended hereto, marked Exhibit 'B'. (Amended Bill of Complaint as Amended, Paragraph 6, admitted in the Answer thereto, Paragraph 6.)"

The Court ignored the above request.

15. The Learned Chancellor erred in refusing to affirm plaintiff's eleventh request for finding of fact. The request and ruling thereon are as follows:

"11. On August 24, 1925, plaintiff received a letter from the Franklin Trust Company, dated August 22, 1925, a copy of which is appended hereto and marked Exhibit 'C'. (Amended Bill of Complaint as Amended, Paragraph 7, admitted in the Answer thereto, Paragraph 7.)"

The Court ignored the above request.

[fol. 120] 16. The Learned Chancellor erred in refusing to affirm plaintiff's twelfth request for finding of fact. The request and ruling thereon are as follows:

"12. On August 25, 1925, plaintiff entered into an oral agreement with the Franklin Trust Company with respect to the acceptance of cash, drafts and checks by it from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware, and Eastern Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 8, admitted in the Answer thereto, Paragraph 8.)"

The Court ignored the above request.

17. The Learned Chancellor erred in refusing to affirm plaintiff's thirteenth request for finding of fact. The request and ruling thereon are as follows:

"13. The terms and provisions of said oral agreement of August 25, 1925, were:

(a) Plaintiff would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a 'Disbursement Account'.

(b) On Wednesday of each week, plaintiff would forward, from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to plaintiff, or its depository, in New York City; said account to be known as a 'Deposit Account'. [fol. 121] (d) The Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks, in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of plaintiff; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to plaintiff, or its depository in New York City.

(e) The plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

18. The Learned Chancellor erred in refusing to affirm plaintiff's fourteenth request for finding of fact. The request and ruling thereon are as follows:

[fol. 122] "14. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff would open a checking account, to be known as the 'Disbursement Account', with the Franklin Trust Company, and maintain an average balance of not less than $25,000.00 therein, by forwarding a sum sufficient therefor, on Wednesday of each week, direct from its New York office to the Franklin Trust Company, interest to be paid on this account at the rate of 2% per annum. (Amended Bill of Complaint as Amended, Paragraph 8, clauses (a) and (b), admitted in the corresponding clauses of Paragraph 8 of the Answer thereto.)"

The Court ignored the above request.

19. The Learned Chancellor erred in refusing to affirm plaintiff's fifteenth request for finding of fact. The request and ruling thereon are as follows:

"15. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company, would accept, from plaintiff's distributors in Philadelphia, cash, also checks and drafts for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week, to plaintiff or its depository in New York City; said account to be known as the 'Deposit Account'. (Amended Bill of Complaint as Amended, Paragraph 8, Clause (c), admitted in the corresponding clause of Paragraph 8 of the Answer thereto."

The Court ignored the above request.

20. The Learned Chancellor erred in refusing to affirm plaintiff's sixteenth request for finding of fact. The request and ruling thereon are as follows:

"16. The said oral agreement of August 25, 1925, did not provide for the payment of interest by the Franklin Trust Company upon the cash, together with the proceeds from the [fol. 123] drafts and checks, accepted by it from plaintiff's distributors for forwarding to plaintiff in New York City. (Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

21. The Learned Chancellor erred in refusing to affirm plaintiff's seventeenth request for finding of fact. The request and ruling thereon are as follows:

"17. The said oral agreement of August 25, 1925, did not permit the Franklin Trust Company to intermingle the funds in plaintiff's Disbursement Account and Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

22. The Learned Chancellor erred in refusing to affirm plaintiff's eighteenth request for finding of fact. The request and ruling thereon are as follows:

"18. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject to the check of, the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d).)"

The Court ignored the above request.

23. The Learned Chancellor erred in refusing to affirm plaintiff's nineteenth request for finding of fact. The request and ruling thereon are as follows:

"19. The said oral agreement of August 25, 1925, provided, inter alia, that a written acknowledgment of the [fol. 124] receipt of said cash, drafts and checks, by each of the said correspondent banks, would be mailed to plaintiff in New York City immediately upon receipt thereof, and a credit advice sent to the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), admitted in the corresponding clause of Paragraph 8 of the Answer thereto.)"

The Court ignored the above request.

24. The Learned Chancellor erred in refusing to affirm plaintiff's twentieth request for finding of fact. The request and ruling thereon are as follows:

"20. The said oral agreement of August 25, 1925, provided, inter alia, that the purpose of the Deposit Account was the handling of daily collections, all moneys received from the Philadelphia plants and out-of-town distributors to be put into this account, and on Monday morning of each week to be transferred, either through the Federal Reserve, or New York correspondent bank of the Franklin Trust Company, so that cash funds to the amount of the weekly collections would be to plaintiff's credit by every Monday at 3 o'clock in the afternoon. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), and Exhibit 'C', Page 2, Paragraph 2.)"

The Court ignored the above request.

25. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-first request for finding of fact. The request and ruling thereon are as follows:

"21. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company, allowing it to use for specified periods of time certain sums from [fol. 125] those accepted by it for forwarding to plaintiff, or its depository, in New York City, these sums to be called by plaintiff's check. (Admitted Bill of Complaint as Amended, Paragraph 8, clause (e).)"

The Court ignored the above request.

26. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-second request for finding of fact. The request and ruling thereon are as follows:

"22. The said oral agreement of August 25, 1925, provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City, were never to be subject to check, except in those instances where special agreements were entered into between the parties for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 8, clause (e).)"

The Court ignored the above request.

27. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-third request for finding of fact. The request and ruling thereon are as follows:

"23. The said oral agreement of August 25, 1925, did not provide that the Franklin Trust Company have a right to use the cash, together with proceeds of drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

28. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-fourth request for finding of fact.. The request and ruling thereon are as follows:

"24. The clerical work necessitated of the Franklin Trust Company, by the Disbursement Account and the Deposit [fol. 126] Account, under said oral agreement of August 25, 1925, was negligible in comparison with that required in the usual checking account."

The Court ignored the above request.

29. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-fifth request for finding of fact. The request and ruling thereon are as follows:

"25. The Franklin Trust Company, pursuant to the terms of said oral agreement of August 25, 1925, selected, with the approval of plaintiff, the following banks in New Jersey, Delaware, and Eastern Pennsylvania, as correspondent banks:

The First Mechanics National Bank of Trenton, Trenton, New Jersey;

West Jersey Trust Company, Parkside Branch, Camden, New Jersey;

The First National Bank, Pleasantville, New Jersey;

Delaware County National Bank, Chester, Pennsylvania;

National Bank of Chester Valley, Coatesville, Pennsylvania;

The Wayne Title & Trust Company, Wayne, Pennsylvania;

Wilmington Trust Company, Wilmington, Delaware;

The Allentown National Bank, Allentown, Pennsylvania;

Farmers National Bank and Trust Company, Reading, Pennsylvania.

(Amended Bill of Complaint as Amended, Paragraph 9, admitted in Paragraph 9 of the Answer thereto.)"

The Court ignored the above request.

30. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-sixth request for finding of fact. The request and ruling thereon are as follows:

[fol. 127] "26. On September 9, 1925, plaintiff wrote the Franklin Trust Company a letter, a copy of which is appended hereto, marked Exhibit 'D'. Said letter stated, inter alia:

'I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer through the American Exchange-Pacific National Bank of $161,680.42. This transfer was not effected in cash funds, that is without further clearance as you advised me you would do.

• • • • • • •

'You will recall that during our conversation you advised me tentatively of your arrangement to transfer through your New York correspondent, The First National Bank and I at the time advised you that I thought it would be effected as it was effected by means of cashier's draft which had to be cleared after its receipt. You will recall that I did not suggest any means by which you could make transfer and allowed you to follow your own suggestions which I am still very pleased to do.

'However, I would be pleased on future transfers to have you effect such in cash funds, in other words, without further clearance after its receipt on Monday of each week.'

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)"

The Court ignored the above request.

31. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-seventh request for finding of fact. The request and ruling thereon are as follows:

"27. On September 12, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 11,

[fol. 128] 1925, a copy of which is appended hereto, marked Exhibit 'E'. Said letter states, inter alia:

'Mr. Vance has handed me your letter of September 9th, advising that the transfer was not affected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

'We have advised the First National today again that this transfer must be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr. Vance tells me that you understand the situation thoroughly and we appreciate your broad minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again.'

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)"

The Court ignored the above request.

32. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-eighth request for finding of fact. The request and ruling thereon are as follows:

"28. On September 27, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 26, 1925, a copy of which is appended hereto, marked Exhibit 'DD'. Said letter contained the following:

'In connection with the out-of-town collections * * * all deposits made in the out-of-town banks * * * are [fol. 129] credited by the local bank on the next day's business, but we do not receive advices of these deposits until the following day. In other words, a deposit made on Monday night in the local bank, credited on Tuesday, advice received by us on Wednesday and is credited by us the same day. * * *

'* * * you will receive a full week's collection from the out-of-town branches, which will include from a Friday night until the following Thursday night of each previous week.'

(Amended Bill of Complaint as Amended, Paragraph 10, admitted in Paragraph 10 of the Answer thereto.)"

The Court ignored the above request.

33. The earned Chancellor erred in refusing to affirm plaintiff's thirtieth request for finding of fact. The request and ruling thereon are as follows:

"30. From August, 1925, until August, 1930, the plaintiff and the Franklin Trust Company performed all the terms and conditions of said oral agreement of August 25, 1925. (Amended Bill of Complaint as Amended, Paragraph 11, admitted in Paragraph 11 of the Answer thereto.)"

The Court ignored the above request.

34. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-first request for finding of fact. The request and ruling thereon are as follows:

"31. Pursuant to the provisions of said oral agreement of August 25, 1925, plaintiff, at the special request and for the sole benefit of the Franklin Trust Company, entered into separate and distinct oral agreements with it, allowing it to use certain funds from the Deposit Account for specified periods of time. The approximate dates of said agreements, [fol. 130] the total sums, and the dates when called by plaintiff's checks follow:

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
Called by three checks:		
One dated March 29, 1928	$140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	200,000.00	440,000.00
June, 1928		100,000.00
Called by check dated June 29, 1928	100,000.00	100,000.00

(Amended Bill of Complaint, as Amended, Paragraph 12.)"

The Court ignored the above request.

35. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-second request for finding of fact. The request and ruling thereon are as follows:

"32. The sums which the plaintiff permitted the Franklin Trust Company to segregate from its Deposit Account, and use, were called at the expiration of the specified periods of time by plaintiff's checks. (Amended Bill of Complaint as Amended, Paragraph 12, admitted in Paragraph 12, of the Answer thereto.)"

The Court ignored the above request.

36. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-third request for finding of fact. The request and ruling thereon are as follows:

[fol. 131] "33. In August, 1930, plaintiff and the Franklin Trust Company orally agreed to, and did modify their oral agreement of August 25, 1925. (Amended Bill of Complaint, as Amended, Paragraph 13, admitted in Paragraph 13 of the Answer thereto.)"

The Court ignored the above request.

37. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-fourth request for finding of fact. The request and ruling thereon are as follows:

"34. The terms and provisions of said modified agreement of August, 1930, were:

(a) The plaintiff would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000. therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

(c) That on Wednesday of each week plaintiff would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(d) That said Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff or its depository, in New York City; said account to continue to be known as a 'Deposit Account.'

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by plaintiff, would [fol. 132] continue to accept, from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of, the Franklin Trust Company only, but earmarked as plaintiff's funds; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be failed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday, and Wednesday of each week, to plaintiff, or its depository, in New York.

(f) That plaintiff might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint, as Amended, Paragraph 13.)"

The Court ignored the above request.

38. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-fifth request for finding of fact. The request and ruling thereon are as follows:

[fol. 133] "35. The said modified agreement of August, 1930, provided, inter alia, that plaintiff would continue a checking account, to be known as the 'Disbursement Account,' with the Franklin Trust Company, and maintain an average balance of not less than $25,000. therein, by forwarding a sum sufficient therefor on Wednesday of each week, direct from its New York Office to the Franklin Trust

Company, interest no longer to be paid on this account. (Amended Bill of Complaint as Amended, Paragraph 13, clauses (a), (b), and (c), admitted in the corresponding clauses of Paragraph 13 of the Answer thereto.)"

The Court ignored the above request.

39. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-sixth request for finding of fact. The request and ruling thereon are as follows:

"36. The said modified agreement of August, 1930, provided, inter alia, that the Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff, or its depository, in New York City; said account to be known as the 'Deposit Account.' (Amended Bill of Complaint as Amended, Paragraph 13, clause (d), admitted in corresponding clause of Paragraph 13 of the Answer thereto.)"

The Court ignored the above request.

40. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-seventh request for finding of fact. The request and ruling thereon are as follows:

"37. The said modified agreement of August, 1930, provided, inter alia, that the correspondent banks in neighbor-[fol. 134] ing towns and cities in New Jersey, Delaware and eastern Pennsylvania, selected by the Franklin Trust Company and approved by plaintiff, would continue to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject only to the check of, the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 13, clause (e).)"

The Court ignored the above request.

41. The Learned Chancellor erred in refusing to affirm plaintiff's fortieth request for finding of fact. The request and ruling thereon are as follows:

"40. The said modified agreement of August, 1930, provided, inter alia, that plaintiff might, at the special request

and for the sole benefit of the Franklin Trust Company, from time to time, continue to enter into separate and distinct oral agreements with the Franklin Trust Company, allowing it to use for specified periods of time certain sums from those accepted by it for forwarding to plaintiff, or its depository, in New York City, on Monday of each week, these sums to be called by plaintiff's check. (Amended Bill of Complaint as Amended, Paragraph 13, clause (f).)"

The Court ignored the above request.

42. The Learned Chancellor erred in refusing to affirm plaintiff's forty-first request for finding of fact. The request and ruling thereon are as follows:

"41. The said modified agreement of August, 1930, provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City were never to be subject to check, except in those instances where special agreements were entered into between the parties [fol. 135] for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 13, clause (f).)"

The Court ignored the above request.

43. The Learned Chancellor erred in refusing to affirm plaintiff's forty-second request for finding of fact. The request and ruling thereon are as follows:

"42. The said oral agreement of August, 1930, did not provide that the Franklin Trust Company have a right to use the cash, together with the proceeds of the drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 13.)"

The Court ignored the above request.

44. The Learned Chancellor erred in refusing to affirm plaintiff's forty-third request for finding of fact. The request and ruling thereon are as follows:

"43. The ultimate destination of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks, from plaintiffs distributors, was the

plaintiff's depository in New York City. (Amended Bill of Complaint as Amended, Exhibits 'B' and 'C.')''

The Court ignored the above request.

45. The Learned Chancellor erred in refusing to affirm plaintiff's forty-fourth request for finding of fact. The request and ruling thereon are as follows:

''44. The ultimate destination of the cash, together with the proceeds of drafts and checks, accepted by the Franklin Trust Company from plaintiff's distributors in Philadelphia, was plaintiff's depository in New York City.''

The Court ignored the above request.

[fol. 136] 46. The Learned Chancellor erred in refusing to affirm plaintiff's forty-fifth request for finding of fact. The request and ruling thereon are as follows:

''45. From August, 1930, until October 5, 1931, plaintiff performed all of its obligations under the terms and provisions of said modified agreement of August, 1930. Amended Bill of Complaint as Amended, Paragraph 14, admitted in Paragraph 14, of the Answer thereto.)''

The Court ignored the above request.

47. The Learned Chancellor erred in refusing to affirm plaintiff's forty-sixth request for finding of fact. The request and ruling thereon are as follows:

''46. Pursuant to the terms and provisions of said modified agreement of August, 1930, plaintiff, at the oral request and for the sole benefit of the Franklin Trust Company, agreed to, and did, allow it to use cash, together with proceeds of drafts and checks, accepted for forwarding to plaintiff in New York City, during September, and part of November, 1930, totaling $100,000.00, which were called by plaintiff's check, dated November 18, 1930, in the amount of $100,000.00. (Amended Bill of Complaint as Amended, Paragraph 14.)''

The Court ignored the above request.

48. The Learned Chancellor erred in refusing to affirm plaintiff's forty-seventh request for finding of fact. The request and ruling thereon are as follows:

"47. The Franklin Trust Company, in accordance with the terms and provisions of said modified agreement of August, 1930, delivered in cash on Monday and Wednesday of each week the entire amount of cash, together with the proceeds of the checks and drafts, during the period, August, 1930 to September 30, 1931, except the said [fol. 137] $100,000.00 which plaintiff permitted the Franklin Trust Company to use. (Amended Bill of Complaint as Amended, Paragraph 15, admitted in Paragraph 15 of the Answer thereto.)"

The Court ignored the above request.

49. The Learned Chancellor erred in refusing to affirm plaintiff's forty-eighth request for finding of fact. The request and ruling thereon are as follows:

"48. The plaintiff dealt directly with the correspondent banks with respect to all uncollectible drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 16.)"

The Court ignored the above request.

50. The Learned Chancellor erred in refusing to affirm plaintiff's forty-ninth request for finding of fact. The request and ruling thereon are as follows:

"49. Plaintiff delivered to the correspondent banks the following drafts, cash and checks, for the forwarding of the cash, together with the proceeds of the drafts and checks, to plaintiff, or its depository, in New York City, on the dates and in the amounts specified:

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less Returned Check			20.85
			$30,486.16

(Amended Bill of Complaint as Amended, Paragraph 16, admitted in Paragraph 16 of the Answer thereto.)"

The Court ignored the above request.

[fol. 138] 51. The Learned Chancellor erred in refusing to affirm plaintiff's fiftieth request for finding of fact. The request and ruling thereon are as follows:

"50. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks received on October 3, and 5, 1931, and credit advices thereof were received by the Franklin Trust Company on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 17, admitted in Paragraph 17 of the Answer thereto.)"

The Court ignored the above request.

52. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-first request for finding of fact. The request and ruling thereon are as follows:

"51. The checks and drafts delivered to the correspondent banks by plaintiff, on October 3 and 5, 1931, were not collected by them until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 18, admitted in Paragraph 18 of the Answer thereto.)"

The Court ignored the above request.

53. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-second request for finding of fact. The request and ruling thereon are as follows:

"52. On September 26, 1931, plaintiff delivered cash, also drafts and checks in the amount of $1917.10, to the Wilmington Trust Company, Wilmington, Delaware, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company in Philadelphia, for forwarding to the plaintiff, or its depository, in New York City. (Amended Bill of Complaint as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)"

The Court ignored the above request.

[fol. 139] 54. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-third request for finding of fact. The request and ruling thereon are as follows:

"53. Advice of the receipt of said sum of $1917.10 by the Wilmington Trust Company was not received by the

Franklin Trust Company until on or after October 6, 1931. (Amended Bill of Complaint, as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)"

The Court ignored the above request.

55. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-fourth request for finding of fact. The request and ruling thereon are as follows:

"54. The total amount of cash, drafts and checks delivered by plaintiff to the correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company, to be forwarded by it to plaintiff, or its depository, in New York City, was $32,403.26. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)"

The Court ignored the above request.

56. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-fifth request for finding of fact. The request and ruling thereon are as follows:

"55. The said sum of $32,403.26 was in the possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow, under order of this court and agreement of counsel, pending the determination of this court as to whom it should be paid. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)"

The Court ignored the above request.

[fol. 140] 57. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-sixth request for finding of fact. The request and ruling thereon are as follows:

"56. Plaintiff delivered to the Franklin Trust Company in Philadelphia, for the purpose of forwarding to plaintiff,

or its depository in New York City, the cash, checks and drafts, on the dates and in the amounts as follows:

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17

(Amended Bill of Complaint as Amended, Paragraph 21, admitted in Paragraph 21 of the Answer thereto.)''

The Court ignored the above request.

58. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-seventh request for finding of fact. The request and ruling thereon are as follows:

''57. The drafts and checks in the amount of $8,747.50, delivered by plaintiff to the Franklin Trust Company on October 3, 1931, were not collected by it until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 22, admitted in Paragraph 22 of the Answer thereto.)''

The Court ignored the above request.

59. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-eighth request for finding of fact. The request and ruling thereon are as follows:

[fol. 141] ''58. The Franklin Trust Company did not, as it promised in said modified agreement of August, 1930, forward to plaintiff, or its depository, in New York City, on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03, delivered to it on October 3, 1931, or a total cash sum of $40,642.67. (Amended Bill of Complaint as Amended, Paragraph 23, admitted in Paragraph 23 of the Answer thereto.)''

The Court ignored the above request.

60. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-ninth request for finding of fact. The request and ruling thereon are as follows:

"59. The cash, together with the proceeds of the drafts and checks, in the amount of $49,590.17 were diverted to, and mingled with, the cash funds of the Franklin Trust Company, without plaintiff's specific consent or approval. (Amended Bill of Complaint as Amended, Paragraph 24, admitted in Paragraph 24 of the Answer thereto.)"

The Court ignored the above request.

61. The Learned Chancellor erred in refusing to affirm plaintiff's sixtieth request for finding of fact. The request and ruling thereon are as follows:

"60. The cash funds of the Franklin Trust Company were augmented to the extent of $49,590.17 by plaintiff's delivery to the Franklin Trust Company of the said cash, drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 25, admitted in Paragraph 25 of the Answer thereto.)"

The Court ignored the above request.

62. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-first request for finding of fact. The request and ruling thereon are as follows:

[fol. 142] "61. The cash funds of the Franklin Trust Company have been at all times since its acceptance from plaintiff of said cash, drafts and checks, and now are, in excess of the total amount of said cash and the proceeds of said drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 26, admitted in Paragraph 26 of the Answer thereto.)"

The Court ignored the above request.

63. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-second request for finding of fact. The request and ruling thereon are as follows:

"62. There were, and now are, assets of the Franklin Trust Company, in the possession and control of the defendants, sufficient to pay plaintiff and all other preferred claimants in full. (Amended Bill of Complaint as

Amended, Paragraph 27, admitted in Paragraph 27 of the Answer thereto.)"

The Court ignored the above request.

64. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-third request for finding of fact. The request and ruling thereon are as follows:

"63. The correspondent banks were the agents of plaintiff."

The Court ignored the above request.

65. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-fourth request for finding of fact. The request and ruling thereon are as follows:

"64. The Franklin Trust Company did not purchase from plaintiff the drafts and checks accepted for the purpose of collection and forwarding the proceeds thereof to plaintiff, or its depository, in New York City."

The Court ignored the above request.

[fol. 143] 66. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-fifth request for finding of fact. The request and ruling thereon are as follows:

"65. October 4, 1931, was Sunday."

The Court ignored the above request.

67. The Learned Chancellor erred in his conclusion of law that

"The parties in this case did not create or contemplate a trust relation as to the deposit account, and that this applies equally to the money directly deposited by the plaintiff's Philadelphia plants and that received through the out-of-town correspondent banks." (Opinion sur Pleadings and Proof.)

68. The Learned Chancellor erred in his conclusion of law that:

"The original agreement contemplated the use by the Trust Company in its general business of all funds depos-

ited and of necessity authorized their commingling with its other general funds." (Opinion sur Re-Argument.)

69. The Learned Chancellor erred in disregarding and treating as meaningless that part of paragraph 8, sub-section c of the Amended Answer reading:

"Defendants qualify the allegations in sub-division c of paragraph 8 of the Amended Bill of Complaint, as Amended, as follows:

'As by reference to the exhibits to the Amended Bill of Complaint as Amended, will more specifically appear.'"

70. The Learned Chancellor erred in his conclusion of law that the following averments in the defendant's Amended Answer were averments of facts:

[fol. 144] "Defendants qualify the allegations in sub-division C of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

'As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a "deposit account" in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository.'" (Paragraph 8.)

"Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or

the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in sub-division E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said 'deposit account' and in the outlying banks, in accordance with the agreement of the parties as set forth in sub-divisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which [fol. 145] said funds were in the possession of the Franklin Trust Company and/or the outlying banks, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein." (Paragraph 8.)

"Defendants further aver that, in accordance with the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, the General Baking Company authorized the Franklin Trust Company to retain and use all funds deposited by the General Baking Company in the Franklin Trust Company or outlying banks, whether deposited in the account known as "Deposit Account' or otherwise, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein." (Paragraph 12.)

"It is averred that by and under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, consent and approval were given by the General Baking Company to the Franklin Trust Company to divert said funds to and mingle said funds with the general funds of the Franklin Trust Company." (Paragraph 24.)

71. The Learned Chancellor erred in his conclusion of law that:

"The general rule is too well settled to admit of question that in the absence of any special agreement providing for a trust or agency a deposit in a bank to be credited to the depositor, creates the relation of a debtor and creditor." (Opinion sur Re-Argument.)

72. The Learned Chancellor erred in refusing to affirm the plaintiff's first request for conclusion of law. The con-
[fol. 146] clusion and the Court's ruling thereon are as follows:

"1. The acceptance by the Franklin Trust Company from plaintiff's distributors in Philadelphia, of the cash, also the drafts and the checks for collection, for the purpose of forwarding and delivering the cash, together with the proceeds of the drafts and checks, amounting to $49,590.17, to the plaintiff in New York City, created an express trust thereof."

The Court ignored the above request.

73. The Learned Chancellor erred in refusing to affirm the plaintiff's second request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"2. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $49,590.17, accepted by the Franklin Trust Company from plaintiff's distributors, on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City."

The Court ignored the above request.

74. The Learned Chancellor erred in refusing to affirm the plaintiff's third request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"3. There was an equitable assignment to plaintiff of cash funds in the possession of the Franklin Trust Company in the amount of $40,642.67."

The Court ignored the above request.

75. The Learned Chancellor erred in refusing to affirm the plaintiff's fourth request for conclusion of law. The
[fol. 147] conclusion and the Court's ruling thereon are as follows:

"4. Plaintiff has an equitable lien on the fund of $49,590.17, in defendants' possession, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company, on October 2 and

3, 1931, for forwarding and delivering to plaintiff in New York City."

The Court ignored the above request.

76. The Learned Chancellor erred in refusing to affirm the plaintiff's fifth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"5. Plaintiff is entitled to a lien upon the assets of the Franklin Trust Company, now in possession and control of the defendants, to the extent of $49,590.17, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City."

The Court ignored the above request.

77. The Learned Chancellor erred in refusing to affirm the plaintiff's sixth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"6. Upon the failure of the Franklin Trust Company, on October 5, 1931, to forward and deliver to plaintiff the cash sum of $40,642.67, which was accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City, on October 5, 1931, the Franklin Trust Company became trustee ex maleficio thereof."

The Court ignored the above request.

[fol. 148] 78. The Learned Chancellor erred in refusing to affirm the plaintiff's seventh request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"7. Full title to, and ownership of, the drafts and checks, amounting to $9,753.18, delivered by plaintiff's distributors on October 2 and 3, 1931, for collection by the Franklin Trust Company, for the purpose of forwarding and delivering the proceeds thereof to plaintiff in New York, remained in plaintiff until the same were collected by defendants on or after October 6, 1931."

The Court ignored the above request.

79. The Learned Chancellor erred in refusing to affirm the plaintiff's eighth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"8. The Franklin Trust Company was not a purchaser for value of any of the drafts and checks, amounting to $9,753.18, delivered to it for collection by plaintiff's distributors on October 2 and 3, 1931."

The Court ignored the above request.

80. The Learned Chancellor erred in refusing to affirm the plaintiff's ninth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"9. The collection by defendants of the proceeds of the drafts and checks, delivered by plaintiff's distributors to the Franklin Trust Company, on October 2 and 3, 1931, in the amount of $8,747.50, and their subsequent failure to forward and deliver the proceeds to plaintiff in New York City, constituted the defendants trustees' trustees ex maleficio for that amount."

The Court ignored the above request.

[fol. 149] 81. The Learned Chancellor erred in refusing to affirm the plaintiff's tenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"10. Under Section 13 of the Pennsylvania Act of June 12, 1931, P. L. 572, plaintiff has a right to the immediate payment of $8,747.50, the proceeds of drafts and checks accepted by the Franklin Trust Company for collection and collected by defendants subsequent to the closing of the Franklin Trust Company."

The Court ignored the above request.

82. The Learned Chancellor erred in refusing to affirm the plaintiff's eleventh request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"11. The plaintiff is entitled to immediate payment of said trust funds, in the amount of $49,590.17, with interest, out of the cash funds of the Franklin Trust Company."

The Court ignored the above request.

83. The Learned Chancellor erred in refusing to affirm the plaintiff's twelfth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"12. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were not branch banks of the Franklin Trust Company."

The Court ignored the above request.

84. The Learned Chancellor erred in refusing to affirm the plaintiff's thirteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

[fol. 150] "13. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were the agents of plaintiff."

The Court ignored the above request.

85. The Learned Chancellor erred in refusing to affirm the plaintiff's fourteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"14. The acceptance from plaintiff's agents by the correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania, of cash, also drafts and checks for collection, for the purpose of crediting the same to the Franklin Trust Company in Philadelphia, for forwarding and delivering the cash, together with the proceeds of the checks and drafts, amounting to $32,403.26, to plaintiff in New York City, created an express trust thereof."

The Court ignored the above request.

86. The Learned Chancellor erred in refusing to affirm the plaintiff's fifteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"15. Plaintiff is entitled to the immediate payment of said trust funds in the amount of $32,403.26, with accrued interest thereon."

The Court ignored the above request.

87. The Learned Chancellor erred in refusing to affirm the plaintiff's sixteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"16. Plaintiff has an equitable lien upon the fund of $32,403.26, now held in escrow, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks on September 26, Octo-
[fol. 151] ber 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company."

The Court ignored the above request.

88. The Learned Chancellor erred in refusing to affirm the plaintiff's seventeenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"17. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $32,403.26, accepted by the correspondent banks from plaintiff's distributors on September 26, October 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company."

The Court ignored the above request.

89. The Learned Chancellor erred in refusing to affirm the plaintiff's eighteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"18. Full title to, and ownership of the drafts and checks, amounting to $7,163.38, delivered by plaintiff's agents to the correspondent banks on October 2, 3 and 5, 1931 for collection, remained in plaintiff until the same were collected by the correspondent banks on or after October 6, 1931."

The Court ignored the above request.

90. The Learned Chancellor erred in refusing to affirm the plaintiff's nineteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

[fol. 152] "19. Neither the correspondent banks nor the Franklin Trust Company was a purchaser for value of said drafts and checks delivered to the former on October 2, 3 and 5, 1931."

The Court ignored the above request.

91. The Learned Chancellor erred in refusing to affirm the plaintiff's twenty-first request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"21. The defendants are liable for the payment of the costs of this litigation."

The Court ignored the above request.

92. The Learned Chancellor erred in his conclusion of law that

"The mere fact that time and banking machinery were required to get these deposits into the general moneys of the Trust Company during which time they may have been susceptible of identification, is unimportant, unless there was something definite to indicate that the parties intended that two different kinds of relationship should successively come into being with regard to those out-of-town deposits, namely, a trust relationship until they reached the deposit account, and a debtor and creditor relationship thereafter. That would be a curious thing to do. * * *" (Opinion sur Pleadings and Proof.)

93. The Learned Chancellor erred in his conclusion of law that

"There is no trust relationship as to either of the funds involved in this suit and the plaintiff is not entitled to a preferred claim against the estate of the Franklin Trust Company, but has merely the status of a depositor." (Opinion sur Pleadings and Proof.)

[fol. 153] 94. The Learned Chancellor erred in entering as a final decree in this cause, on the fourteenth day of June, A. D. 1933, the following:

"This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, Adjudged and Decreed as follows:

"That plaintiff's Bill in Equity be dismissed, with costs to be paid by plaintiff."

95. The Learned Chancellor erred in dismissing complainant's amended bill of complaint as amended.

Wherefore appellants pray that the decree entered in the said cause in the said District Court of the United States, for the Eastern District of Pennsylvania, be reversed.

Conlen, LaBrum & Beechwood, by (Sgd.) George E. Beechwood.

[fol. 154] In United States District Court

Petition for Appeal—Filed September 8, 1933

To the Honorable J. Whitaker Thompson, Circuit Judge:

The above-named complainant, General Baking Company, feeling aggrieved by the decree rendered and entered in the above-entitled case on the fourteenth day of June, 1933, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Third Circuit for the reason set forth in the assignments of error filed herewith, and prays that the appeal be allowed and a citation be issued as provided by law, and that a transcript of the orders, records, proceedings and documents, upon which the said decree was based, duly authenticated, be forwarded to the United States Circuit Court of Appeals for the Third Circuit, under the rules of such court in such case made and provided.

And your petitioner further prays that a proper order relating to the security required of it to perfect the appeal be made.

Dated at Philadelphia, Pennsylvania, the fifth day of September, 1933.

General Baking Company, by its Attorneys, Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Petitioner.

[fol. 155] In United States District Court

Order Allowing Appeal—Filed September 8, 1933

On reading the petition of the General Baking Company, complainant in error, for appeal, and the assignments of error, upon due consideration of the record of the said cause:

It Is Ordered that an appeal be allowed from the United States Circuit Court of Appeals for the Third Circuit and the decree entered in the District Court of the United States for the Eastern District of Pennsylvania, as prayed for in said petition; that said appeal and citation thereon be issued, served and returned to the United States Circuit Court of Appeals for the Third Circuit, in accordance with law; that a duly authenticated transcript of the records, proceedings and documents in this matter be forthwith transmitted to the United States Circuit Court of Appeals for the Third Circuit upon condition that the said petitioner and complainant in error give security in the sum of two hundred fifty dollars ($250); that the said complainant in error shall prosecute the said appeal to effect and if the said complainant in error fails to make good its plea, shall answer to the defendant in error for all costs and damages that may be adjudged and decreed on account of said appeal.

The complainant in error now presenting a bond in the sum of two hundred fifty dollars ($250) with the Fidelity and Casualty Company of New York as surety, it is ordered that the same be and hereby is duly approved by the Court.

(Sgd.) J. W. Thompson, J.

[fol. 156] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 157] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, in Possession of Business and Property of Franklin Trust Co., et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 15th day of March, A. D. 19—, it is ordered that Hon. Guy L. Fake, District Judge for the District of New Jersey, and Hon. —— ——, District Judge for the District of —, be, and he is hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

Endorsements: Order Assigning. Hon. Guy L. Fake, for argument. Rec'd & Filed March 15, 1934. Wm. P. Rowland, Clerk.

[fol. 158] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING CO., Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Appellees

And afterwards, to wit, the 15th day of March, 1934, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and Honor-

able Guy L. Fake, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of September, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 159] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Defendants-Appellees.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed September 28, 1934

Before Davis and Thompson, Circuit Judges, and Fake, District Judge

DAVIS, Circuit Judge:

An oral agreement, supplemented, modified or interpreted in part by letters, was entered into on October 25, 1925 by the General Baking Company and the Franklin Trust Company, whereby the Baking Company opened two accounts in the Trust Company, a checking account called the "Disbursement" account and a "Deposit" account.
[fol. 160] The "Disbursement" account was the ordinary checking account, and in this account the Baking Company was to maintain an average balance of $25,000 by means of weekly deposits from the New York Office. From it payroll funds, etc. were to be withdrawn.

The Trust Company was to accept cash, drafts and checks from the three Philadelphia plants. All of these

funds were to be deposited in the "Deposit" account. There was a "Disbursement" and a "Deposit" account for each one of the three places of business.

The plaintiff also made sales through distributors in neighboring towns in New Jersey, Delaware and elsewhere in Pennsylvania and the Trust Company was to select certain of its correspondent banks in these towns which would accept from the distributors in their territory cash, checks and drafts which were to be "ear-marked" according to the bill of complaint, as funds of the plaintiff. As these deposits were made in these banks, they were to notify the Trust Company which would thereupon credit them to the "Deposit" account of the plaintiff.

The cash together with the proceeds of the drafts and checks in this account was to be forwarded by the Trust Company to plaintiff in New York on Mondays and Wednesdays. At first these funds were to be sent only once a week and 2% interest on the "Disbursement" account was to be allowed, but when the change was made and the funds were to be sent to New York twice a week rather than once, interest was not thereafter paid on the account.

On October 5, 1931, the Secretary of Banking of Pennsylvania took over the Franklin Trust Company for liquidation. At that time there was in the "Disbursement" account $36,000, but plaintiff admits that it does not [fol. 161] have a prior claim upon this. There was in the "Deposit" account in the Trust Company $49,930.17. There was also in the various out-of-town correspondent banks cash, drafts and checks for $32,403.26. There was accordingly in the "Deposit" account in the Trust Company and the correspondent banks $82,333.43. Appellant contends that this was a trust fund and that it, therefore, has a prior claim upon it. Appellees freely admit that if this was a trust fund, plaintiff has a prior right to it, but they contend that it was not a trust fund. The District Court sustained this contention.

The appellees while contending that the conclusions of the District Court are right on the question of the trust fund, nevertheless, contend that the court was without jurisdiction. They contend, since the Secretary of Banking had assumed control of the Trust Company and had become a statutory receiver, the State court thereby first acquired jurisdiction over the Trust Company. The Dis-

trict Court held that regardless of what the Secretary might be called, he was not an equity receiver and that the State court did not acquire prior jurisdiction because of the taking over of the Trust Company by the Secretary of Banking. The District Court accordingly held that it first acquired jurisdiction and continues to hold it.

From the decree of the District Court based upon these holdings, this appeal was taken.

We are in full accord with the learned District Judge and for the reasons set forth in his opinions, his decree is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 162] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. Warren Davis, Circuit Judge.

Endorsements: Order Assigning Hon. Guy L. Fake for Argument. Rec'd & Filed March 15, 1934. Wm. P. Rowland, Clerk.

[fol. 163] [File endorsement omitted]

[fol.163-1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REARGUMENT—Filed October 26, 1934

Comes now your petitioner, the General Baking Company, Plaintiff-Appellant above named, and respectfully petitions the Court to grant a reargument in the above cause, and in support thereof represents:

1. Plaintiff filed a Bill in equity to impress a trust on $81,993.43. This Court held that there was no trust and affirmed an order of the lower Court dismissing the Bill. In so doing, it appears that the Court must have inadvertently overlooked Plaintiff's right to the sums of $15,736.74 and $25,239.88, regardless of the existence of a trust. Plaintiff's right to recover the $15,736.74 is derived from the Pennsylvania Bank Collection Act of June 12, 1931, P. L. 568, as interpreted by the Courts of Pennsylvania, and the decision [fol. 163-2] of the United States Supreme Court interpreting and applying a similar statute of a sister State. Plaintiff's right to recover the $25,239.88 is based upon a decision of the Supreme Court of the United States. It appears that neither this Court, nor the lower Court, considered the Pennsylvania Bank Collection Act, or the principles involved, although covered by Assignments of Error and discussed at length in the appellant's brief (see pp. 63 to 68). It also appears that this Court did not consider the case of Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, in respect to Plaintiff's right to the $25,239.88 in outlying banks in Eastern Pennsylvania, New Jersey and Delaware.

2. To eliminate any possible doubt in the premises, your petitioner, for the purpose of this petition accepts the decision of the Court that no trust existed. Irrespective of this, Plaintiff is entitled to recover the sums referred to above.

3. Plaintiff averred that Defendant, William D. Gordon, Secretary of the Department of Banking, at the close of the business day of October 5, 1931, closed and took possession and control of the business and property of the Franklin

Trust Company (R. p. 38, Par. 2). Defendant admitted this (R. p. 73, Par. 2). Plaintiff averred that on October 3 and 5, 1931, drafts and checks totalling $6989.08 were delivered to the banks in Eastern Pennsylvania, New Jersey and Delaware (R. p. 49, Par. 16). Defendant admitted this (R. p. 79, Par. 16). Plaintiff averred that drafts and checks delivered by Plaintiff to the correspondent banks on October 3 and 5, 1931, were not collected by the banks until on or after October 6, 1931 (R. p. 50, Par. 18). Defendant admitted this (R. p. 79, Par. 18). Plaintiff averred that Defendant delivered to the Franklin Trust Company on [fol. 163-3] October 3, 1931, checks and drafts totalling $8747.66 (R. p. 50, Par. 21). Defendant admitted this (R. p. 80, Par. 21). Plaintiff averred that the checks and drafts delivered by Plaintiff to the Franklin Trust Company on October 3, 1931, were not collected by the bank until on or after October 6, 1931 (R. p. 51, Par. 22). Defendant admitted this (R. p. 80, Par. 22). The Defendant has unqualifiedly admitted of record that he received the sum of $15,736.74 representing the proceeds of drafts and checks collected by him after the Franklin Trust Company had ceased business and its doors closed at his direction.

(A) Assuming the General Baking Company was an ordinary depositor it is entitled to the return of the proceeds of these drafts and checks under the plain language of the statutes of Pennsylvania and the decisions of Pennsylvania Courts. The Franklin Trust Company was not a purchaser for value of the said drafts and checks but a collecting agent.

The pertinent provisions of the Pennsylvania Bank Collection Act of June 12, 1931, P. L. 568, are as follows:

"Except as otherwise provided by agreement * * * *the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor.* * * *" (Section 2.)

"Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special indorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor. * * *" (Section 4, Clause 3.)

"It shall be the duty of the initial or any subsequent agent collecting bank to exercise ordinary care in the col-

[fol. 163-4] lection of an item, and when such duty is performed such agent bank shall not be responsible if, for any cause, payment is not received in money or an unconditional credit given on the books of another bank, which such agent bank has requested or accepted. An initial or subsequent agent collecting bank shall be liable for its own lack of exercise of ordinary care but shall not be liable for the neglect, misconduct, mistakes, or defaults of any other agent bank or of the drawee or payor bank." (Section 5.)

"*Where an agent collecting bank,* other than the drawee or payor, *shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank,* which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefore, *the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds, and such owner or owners shall be entitled to a preferred claim upon such assets,* irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank." (Section 13, Clause (c).) (Italics ours.)

In the case of In re United Security Trust Company, 19 D. & C. (Pa.) 303, the court stated the facts as follows:

"On Saturday, October 3, 1931, between 12 o'clock and 1 P. M., the First Penny Savings Bank Philadelphia deposited in its checking account with the United Security Trust Company the sum of $4,006.24, which deposit con- [fol. 163-5] sisted of checks on various banking institutions and checks drawn on the Treasurer of the United States of America; that $1,850.94 of these checks were drawn on banks which were not members of the Philadelphia Clearing House Association, and the balance of the checks in the sum of $2,155.30 were drawn on banks which were members of the Philadelphia Clearing House Association; that the checks which were drawn on banks which were not mem-

bers of the Philadelphia Clearing House Association were deposited by the United Security Trust Company on October 3, 1931, with the Philadelphia National Bank, which bank gave the United Security Trust Company credit in the amount of the said checks, to wit, $1,850.94, on October 3, 1931, on which day the United Security Trust Company was indebted to the Philadelphia National Bank in the sum of $548,666.50.

"The United Security Trust Company never opened for business on Monday, October 5, 1931, and possession of the same was taken by the Secretary of Banking of the Commonwealth of Pennsylvania. After possession was so taken, the checks aggregating $2,155.30, drawn on the banking institutions which were members of the Philadelphia Clearing House Association were not put through the Philadelphia Clearing House but were collected at the various banks on which they were drawn on October 5, 1931, by payments of cash against the checks, and subsequent to the closing of the trust company the First Penny Savings Bank Philadelphia assigned its claim to the Western Saving Fund Society of Philadelphia.

"While the deposit was made on Saturday, October 3, 1931, it was entered in the depositor's bank book as of October 5, 1931, and on the records of the bank the deposit was entered as of October 3, 1931."

The court continued:

"As to the $2,155.30 in checks which were in the United Security Trust Company at the time the Secretary of Bank-[fol. 163-6] ing took possession of the said trust company on October 5, 1931, it is clear that the claimant was entitled to have them or their proceeds returned to it.

"Section 2 of the Act of June 12, 1931, P. L. 568, provides as follows:

'Except as otherwise provided by agreement and except as to subsequent holders of a negotiable instrument payable to bearer or indorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor —and any credit given by any such agent or subagent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given

on the books of another bank, which such agent has requested or accepted.'

"Under the express provisions of the aforesaid act the United Security Trust Company, on October 3, 1931, became the agent of the depositor for the collection of the checks deposited and the credit given to the depositor was revocable until the time *of* the proceeds were received in actual money or unconditional credit, and it was also well settled prior to the enactment of the Act of 1931 that the bank was the agent of the depositor until the checks were actually collected; Hazlett v. Commercial N. Bank, 132 Pa. 118; National Bank of Phoenixville v. Bonsor, 38 Pa. Superior Ct. 275; New York Hotel Statler Company, Inc., v. Girard National Bank, 89 Pa. Superior Ct. 537.

"The status of every depositor in the bank was fixed as of the time when the Secretary of Banking took possession of the bank on the morning of October 5, 1931. This is the rule with reference to all receivers and bankruptcy proceedings: Blum Brothers v. Girard National Bank et al., 248 [fol. 163-7] Pa. 148; Chambersburg Trust Co. v. Alexander, 102 Pa. Superior Ct. 158; Dean and Son's Appeal, 98 Pa. 101; McDonald v. Williams, 174 U. S. 397.

"At the time the Secretary of Banking took possession of the property of the United Security Trust Company, therefore, as to the $2,155.30 of checks which remained at the trust company at that time, as they had not as yet been collected, the bank at that time was the agent of the depositor for their collection, and the credit that was given to the depositor was revocable, the checks belonging to the claimant could easily be segregated and nothing that was done by the agent in the charge of the bank after the Secretary of Banking took possession could affect the legal status of the claimant.

"Section 13 (a) of the Act of 1931 provides as follows: 'When the drawee or payor, or any other agent collecting bank, shall fail or be closed for business by the Secretary of Banking, or by action of the board of directors, or by other proper legal action, after an item shall be mailed or otherwise entrusted to it for collection or payment but before the actual collection or payment thereof, it shall be the duty of the receiver or other official in charge of its assets to return such item, if same is in his possession, to

the forwarding or presenting bank with reasonable diligence.'

"Under this section of the act, inasmuch as the trust company was closed for business by the Secretary of Banking before the actual collection of the $2,155.30 of checks, it was the duty of the receiver, since they were in his possession, to return them to the claimant. These rights of the claimant were fixed at the time the Secretary of Banking took possession and could not be affected by any act of the receiver contrary to the express provisions of the act, and the fact that the agent in charge of the trust company subse- [fol. 163-8] quently collected this money can have no effect on the status of the claimant, which was fixed at the time the Secretary of Banking took possession. The Secretary of Banking is a public officer, and when he takes charge of a bank it is imperative that he conduct its affairs in accordance with statutory provisions, and under the express wording of the above section of the act the claimant was entitled to have checks which were still in the bank uncollected returned to it.

"Even before the enactment of the Act of 1931, it was well settled, both in our State and in other jurisdictions, where the relation between the depositor and the bank, until the checks are collected, is that of principal and agent, that when there are uncollected checks in the possession of the Secretary of Banking at the time when he takes charge of the bank, the depositor is entitled to a return of the checks or the funds which are subsequently collected.

"In the case of Eppinger, Executor, v. Allen et al., Trustees, 8 D. & C. 321, where this very question came before our courts, and which was decided before the enactment of the Act of 1931, the court held as follows:

'When a bank, which becomes insolvent or which makes an assignment for the benefit of creditors or goes into the hands of a receiver, has at that time uncollected paper on hand, its authority to collect is thereby terminated and the depositor is entitled to a return of the paper; if, instead it is actually collected, the depositor is entitled to a return of the proceeds: Brady, The Law of Bank Checks (1915), S. 214; Selover, Bank Collections (1901), S. 32; 2 Michie, Banks and Banking (1913), S. 166. Numerous cases are to be found in 2 Paton's Digest (1926), S. 1598a. In 1 Morse

on Banks and Banking (5th ed.), S. 249a, the rule is stated: "After a bank has suspended, it ought not to receive pay-
[fol. 163-9] ments upon business paper previously deposited with it for collection; or at least not in such a manner that the money so received by it will pass into its general assets, and the owner of the paper will be placed in the position of one of its creditors, entitled only to take his dividend. * * * Proceeds received after the bank becomes insolvent are held in trust and may be recovered in full.'

'Such is the rule of the Federal courts. See Beal v. Somerville, 50 Fed. Repr. 647 (C. C. A., 1st Cir.); Richardson v. Denegre, 93 Fed. Repr. 572 (C. C. A., 5th Cir.); Richardson v. New Orleans Coffee Co., 102 Fed. Repr. 785 (C. C. A., 5th Cir.); In re Jarmulowsky, 249 Fed. Repr. 319 (C. C. A., 2d Cir.); In re Gubelman, 10 Fed. Repr. (2d) 926 (C. C. A., 2d Cir.), also 10 Fed. Repr. (2d) 935.'

"In the cases of Hackett v. Reynolds, Lamberton & Co., 114 Pa. 328, First National Bank of Clarion v. Gregg & Co., 79 Pa. 384, and Jones & Co. v. Milliken & Son, 41 Pa. 252, it was decided by our Supreme Court that a depositor could recover from a subagent bank the proceeds of commercial paper which had been forwarded to it by another bank for collection, where the forwarding bank became insolvent after it forwarded the paper to the subagent bank but before the subagent bank had received payment; and in the case of Crane, Parris & Company v. The Fourth Street National Bank, 173 Pa. 566, a similar recovery was permitted under similar circumstances from the payee bank.

"In the case of Freiberg et al. v. Stoddard, Assignee, 161 Pa. 259, 266, it was said that:

"* * * If at the time of the assignment the plaintiff's notes had been found by the assignee uncollected, he should have returned them. If a draft or bond or a specific package of money received in payment of the notes had been found [fol. 163-10] among the assets coming into his hands, it should have been turned over to the plaintiff.'

"The same principle of law is stated in 7 C. J. 625, as follows:

'The insolvency of a bank at once terminates its authority to proceed further and if collections are afterwards made,

or those previously undertaken are completed the proceeds are held in trust for the owners.'

"In 3 R. C. L. 635, the same principle of law is stated in the following language:

'It is upon this principle that if a collection has not been completed before the collecting bank becomes insolvent any money thereafter received is the property of the principal and no change of the relation of principal and agent to that of creditor and debtor can be effected after the insolvency of the bank. And so where paper sent to a bank for collection is not paid before the insolvency of the bank it remains as against its assignee for the benefit of creditors or in bankruptcy the property of the customer, and does not pass to the assignee or receiver; and if it is collected by the assignee or receiver he is bound to account to the customer therefor.'

"In the case of Balbach and others v. Frelinghuysen, Receiver, etc., 15 Fed. 675, a similar question came before the Circuit Court of the District of New Jersey where a check was deposited on Saturday and the bank failed to open on Monday, and there was an uncollected check in the bank at the time when the receiver took possession. The court there used the following language:

'It was, perhaps, a gratuitous act for the bank examiner to send it forth for collection. • • •

'The naked question is whether, under such circumstances, [fol. 163-11] the right to recall the check remained with the depositors, or whether it had passed beyond their reach. I see no reason, in principle, which should not allow them to recall it. It was their property until collected. If the bank had continued business, and the check had been returned unpaid, it would have been charged up to their account and handed back to them.' (Page 684.)

"A similar situation, where checks were deposited on Saturday afternoon and the bank closed shortly thereafter, is that of Beal, Receiver v. City of Somerville, 50 Fed. 647, and there also the Circuit Court of Appeals decided that the depositor was entitled to the return of the checks or money.

"To the same effect are the cases of In re State Bank, Insolvent, 56 Minn. 119; Manufacturer's National Bank v.

Continental Bank, 148 Mass. 553, 2 L. R. A. 699, where the court held (Page 559):

'At that time the right of the Fidelity National Bank to mingle with its own funds the proceeds of a check collected for the plaintiff had terminated'; and Alleman et al. v. Sayre, Receiver, et al., 79 W. Va. 763, 91 S. E. 805, L. R. A. 1917D 1002.

"In some jurisdictions in which a contrary view has been taken the decisions are mostly based on the fact that in those jurisdictions it has been held that there is no agency relationship between a depositor and its bank until the funds are collected. The claimant is therefore entitled to recover the $2,155.30 in full.

"The exceptions are sustained as to the claim of $2,155.30, and exceptant is allowed priority in that sum."

It will be noted that the United Security Trust Company failed on October 3, 1931 and the Franklin Trust Company [fol. 163-12] on October 5, 1931. It will also be observed that the Secretary of the Department of Banking, William D. Gordon, was the defendant in that case as well as the defendant in the instant case. At the time these cases arose, and all other cases in which closed Pennsylvania banks were involved, the Secretary of the Department of Banking took the position that the banks were purchasers for value of depositors' checks. However, the Lower Court of Pennsylvania, in interpreting the Bank Collection Act and decisions of the Supreme Court of Pennsylvania, ruled against the defendant. The defendant took no appeal from that decision. It may be assumed therefore that he has conceded its correctness.

In the case at Bar, counsel for the plaintiff urged the Lower Court and this Court to give effect to the same statute. Nevertheless, both the Lower Court and this Court have either refused (by ignoring it) to give effect to it, thereby nullifying it, or have inadvertently overlooked this phase of the case.

It is inconceivable that this Court would deprive the plaintiff of its clear right under the statute when the Pennsylvania Courts interpreting and applying the statute and the law of Pennsylvania gives to other parties such a right. The petitioner cannot believe this Court intended to set

aside and treat as if non-existent, this statute which governs the rights of the parties with respect to the $15,736.74.

Inasmuch as this Court and the Lower Court did not refer to, or discuss, this statute or this phase of the case, it would appear that the Court considered only the question whether or not there was a trust agreement between the plaintiff and the Franklin Trust in respect to the entire sum of $81,993.43 and that the Court did not consider the plaintiff's right to the $15,736.74 and $25,239.88 irrespective of any trust agreement.

[fol. 163-13] Under the plain language of this Act the Franklin Trust Company was an agent collecting bank and the proceeds of the checks and drafts must be returned at once to plaintiff. Moreover, the decisions of the Pennsylvania and federal courts, codified by this Act, reach the same conclusion:

Bank of Wesleyville v. E. D. Rose, 85 Pa. Superior Ct. 52 (1925);

Jacobs v. Mohnton Trust Co., 299 Pa. 527 (1930);

Washington Loan & Banking Co. v. Fourth Nat. Bank of Macon et al., 38 F. (2d) 772 (C. C. A., 5th, 1930).

In Bank of Wesleyville v. Rose, supra, the court stated on page 57:

"It is familiar law that 'when a bank credits a customer with the amount of a check, endorsed by him in blank, deposited in his account, the bank does not in the absence of a special agreement from this fact standing alone become a holder of the paper for value; *the title to the check remains in the depositor.* * * * *The relation arising from such a transaction, as between the bank and the depositor, is that the former becomes the agent of the latter for the purpose of collection'*: * * * In Hazlett v. Commercial Bank, 132 Pa. 118, 125, Chief Justice Paxson said: 'The mere fact that the collecting bank credited him (the depositor) with the check as cash did not alter that relation. This is done daily,—indeed, it is almost the universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit.' " (Italics ours.)

This case was cited with approval in Jocobs v. Mohnton Trust Co., supra (299 Pa. 527, 530).

In Washington Loan & Banking Co. v. Fourth Nat. Bank of Macon, supra, the Court said at pages 774 and 775:

[fol. 163-14] "The relationship of a bank to a draft or check turned over to it by a customer depends on their contract*ing* respecting it. * * * Statutes and local and general banking customs may influence or control the contract.

* * * * * * *

"We think it plain that notwithstanding the blank endorsement of the draft * * * and the immediate entry of a credit to the Washington Bank * * * that it was not their understanding that the Macon bank had at once bought the drafts and credited the proceeds on general deposit. The letter of transmittal expressly stated that each draft was indorsed for collection first, and for credit after its collection, or prompt return if unpaid. *Until collection the ownership of the draft remained in the Washington bank, the Macon bank and its correspondents being only agents for the collection,* and after collection the proceeds remained the property of the Washington bank until finally passed to the latter's checking account by the Macon Bank." (Italics ours.)

The Supreme Court of the United States, in the case of Dakin v. Bally (78 L. Ed. 95), has conclusively ruled in favor of plaintiff. In that case the Receiver for the First National Bank of St. Petersburg sued the Peoples' Bank of Clearwater. The defendant pleaded a set-off by virtue of delivery by the St. Petersburg Bank to the Clearwater Bank of four drafts, drawn on a third bank, which were dishonored. The plaintiff replied that certain checks drawn on the St. Petersburg Bank and other banks in St. Petersburg, were deposited with the Clearwater Bank for collection and were forwarded by it to the St. Petersburg Bank for collection and remittance and that the four drafts in question were in payment thereof. The Supreme Court held that title to and ownership of these checks did not pass to the Clearwater Bank or to the St. Petersburg Bank but [fol. 163-15] that it remained in the depositors until they were actually paid in cash or its equivalent; that the Clearwater Bank acted as agents of the depositors in forwarding the checks to the St. Petersburg Bank; that the depositors had a right of action against the St. Petersburg Bank for

any default in collection and remittance; and that, therefore, the Clearwater Bank, as agent, could not set-off a claim or right existing in its depositors against the St. Petersburg Bank.

The Court said on pages 98, 99:

"A statute of Florida, however, requires of the bank of deposit only due diligence in the forwarding of such a check for collection and in the absence of negligence conditions liability for the amount of the check on receipt of final payment from the collecting bank. The parties are presumed to have contracted with reference to this statute (Federal Reserve Bank v. Malloy, 264 U. S. 160, 68 L. ed. 617, 44 S. Ct. 296, 31 A. L. R. 1261), and the situation is as if they had expressly agreed that the Clearwater bank was to act as agent only and was not to become the debtor of the depositors unless and until it had received actual and final payment of the checks. Since, then, the Clearwater bank acted as the agent of depositors in forwarding checks to the St. Petersburg bank, the depositors have a right of action against the latter for any default in collection or remittance. Federal Reserve Bank v. Malloy, supra.; see also Miami v. First Nat. Bank (C. C. R. 5th) 58 F. (2d) 561.

"* * *What, then, was the situation as disclosed by the record, when the St. Petersburg bank closed its doors? That bank, as sub-agent for the Clearwater bank's depositors, had made collection and sent the drafts for the amount to the Clearwater bank. It is incorrect to say that the St. Petersburg bank paid the amounts collected by forwarding drafts to the Clearwater bank, or that the Clearwater bank upon receipt of the drafts was bound to accept them as [fol. 163-16] payment and its depositors were likewise thereupon bound to treat the agency of the Clearwater bank and that of the St. Petersburg bank as ended and the relation of debtor and creditor as established between them and the Clearwater bank. Equally inaccurate is the assertion that receipt and retention of the drafts required the Clearwater bank, unless its depositors asserted ownership of them, at once to credit the depositors with the amount of the items represented by the drafts. The bank was not bound to assume the relation of debtor until, in the words of the statute, it had received final payment, i. e., cash or its equivalent, and we should not presume that it did so."

It is submitted that under the Pennsylvania Bank Collection Act and the cited cases, plaintiff is entitled to the $15,736.74.

(b) Upon Insolvency, the Franklin Trust Company Lost Its Right to Receive the $25,239.88 in the Outlying Banks, and Plaintiff Became Entitled to Immediate Possession Thereof.

(Assignments 84, 85, 87, 88, 92, 93, 94, 95.)

At the close of the business day on October 5, 1931, when defendants took possession of the assets and property of the Franklin Trust Company, the outlying banks had in their possession $25,239.88 in cash, for forwarding to plaintiff's depository in New York City via the Franklin Trust Company. At that time, however, the Franklin Trust Company had not received any notice nor made any record on its books that the funds had been received by the outlying banks. The notices from the outlying banks were received by defendants after they had taken possession of the Trust Company.

The funds are now held in escrow and were definitely and specifically traced and identified in the outlying banks [fol. 163-17] as those of plaintiff. The Franklin Trust Company was not indebted to the outlying banks. The funds were not reduced to possession by the Franklin Trust Company nor had it set aside an equivalent amount of cash for transfer and delivery to New York.

The cases establish the proposition that the insolvency of the Franklin Trust Company by operation of law terminated its right to receive the funds.

Ellerbe et al. v. Studebaker Corporation of America, 21 F. (2d) 993 (C. C. A., 4th, 1927);

Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50 (1893).

Judge Parker in the case of Ellerbe et al. v. Studebaker Corporation of America, supra (21 F. (2d) 993), stated at page 995:

" * * * it is universally held that the insolvency of a collecting bank at once terminates its authority to proceed further, and if collections are afterwards made, or those previously undertaken are completed, the proceeds

are held in trust for the owner, and can be collected from the receiver if they have come into his possession."

The decision of the Supreme Court of the United States in Commercial Bank of Pennsylvania v. Armstrong, supra (148 U. S. 50), must have been overlooked by this Court.

In the cited case the controversy was between two banks. The Commercial Bank of Pennsylvania sent paper for collection and credit to the Fidelity Bank in Cleveland, Ohio, the balances to be remitted tri-monthly. The Fidelity Bank agreed to "collect at par all points West of Pennsylvania and remit on the first, eleventh and twenty-first of each month" in consideration of the temporary use of the funds. Prior to its failure, the Fidelity Bank had sent some [fol. 163-18] of the paper to subagents for collection, and they had collected it and unconditionally credited the Fidelity Bank with the amounts collected before it had become insolvent. The Court held that the funds in the subagent banks were the property of, and belonged to, the Commercial Bank of Pennsylvania.

The Receiver in the cited case presented to the Supreme Court the same arguments urged by defendants, upon this Court, to wit (at page 55):

"The collection by the correspondent banks was a collection by the Fidelity Bank. The collecting bank was the agent of the Fidelity, and not of the Commercial. And, therefore, these payments are to be regarded precisely as if on those days these sums had been paid directly to the Fidelity Bank. They had all been credited to the Commercial Bank before the failure; they had been charged before the failure to the corresponding banks, and credited by the corresponding banks to the Fidelity National. No notice of the payment was necessary or usual."

Mr. Justice Brewer, speaking for the Supreme Court, answered this argument, at pages 56 and 57, as follows:

"We agree with the circuit Judge that *the relation created between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a subagent of the Fidelity Bank had collected the money due on such paper,* was not a mingling of those collections with the general funds of the Fidelity, and *did not operate to relieve them from the trust obligation created by the agency*

of the Fidelity, or create any difficulty in specifically tracing them. As to such paper, the transaction may be described thus: The plaintiff handed it to the Fidelity, the Fidelity handed it to a subagent, the subagent collected it and held the specific money in hand to be delivered to the [fol. 163-19] Fidelity; then the failure of the Fidelity came, and the specific money was handed to its receiver. That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, *but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it.* * * * If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belongs to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand, *such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected.* Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same. *The Fidelity received this paper as agent.* At the time of its insolvency, when its right to continue in business ceased, it had not fully performed its duties as agent and collector; it had not received the moneys collected by its subagent. They were traceable as separate and specific funds, and, therefore, the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from these subagents he was in fact collecting them as the agent of the principal. No mere book-keeping between the Fidelity and its subagent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction." (Italics ours.)

[fol. 163-20] The fact that the Franklin Trust Company drew checks against the funds in the outlying banks does

not destroy the agency relationship, for in the cited case, the Fidelity Bank was the only one who could draw checks against the sums in the possession of its subagents.

The facts in the case at Bar are much stronger than those in the cited case in favor of a recovery. In the Armstrong case the checks and drafts passed through the hands of the Fidelity which presented them to subagents for collection and credit to the Fidelity Bank. The subagents had actually collected the proceeds from the drafts and checks and unconditionally credited the Fidelity with the amount thereof. The Fidelity, in turn, had unconditionally credited the Commercial. In contrast, the fund in the instant case never passed through the hands of the Franklin Trust Company in any form whatsoever. The Franklin Trust Company did not even receive notice of the acceptance of the funds by the outlying banks until after its doors had been closed and it was declared insolvent. No notation of any kind had been made on its books.

It is submitted that defendants have "no equity in claiming * * * this money" and that it should be immediately turned over to plaintiff.

It is impossible for a debtor and creditor relationship to have existed between the Franklin Trust Company and the plaintiff in this case with respect to the $25,239.88 in the outlying banks. The day on which the Franklin Trust Company closed its doors it had not credited the plaintiff with this sum; it had not become indebted to the plaintiff for that amount. On October 5, 1931, the right of the parties was fixed and on that day no credit had been given by the Franklin Trust Company to plaintiff. The defendant [fol. 163-21] did not subsequently receive these funds. They are now held in escrow.

Wherefore your petitioner, plaintiff-appellant, prays your Honorable Court to order a reargument.

And it will ever pray.

General Baking Co., by its Attorneys, Conlen, LaBrum & Beechwood, by George E. Beechwood.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

George E. Beechwood, being duly sworn according to law, deposes and says that he is a member of the law firm

of Conlen, LaBrum & Beechwood, attorneys for the petitioner, in above petition for reargument, and that said petition is not filed for any purpose of delay, but because he, the said George E. Beechwood, verily believes that grave injustice will result if the said petition is not granted.

George E. Beechwood.

Sworn to and subscribed before me this 26th day of October, 1934. Florence C. O'Neill, Notary Public. My commission expires February 21, 1937. (Seal.)

[fol. 164] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Company, et al., Appellees

SUR PETITION FOR REHEARING

And Now, to wit, November 21, 1934, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia.

J. Warren Davis, Circuit Judge.

Endorsements: Order Granting rehearing. Received & Filed Nov. 21, 1934. Wm. P. Rowland, Clerk.

[fol. 165] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and Charles I. Engard (Successor to John J. Sullivan), Special Deputy in Charge, Appellees

And afterwards, to wit, 14th day of December, 1934, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs. before the Honorable J. Warren Davis and Honorable

J. Whitaker Thompson, Circuit Judges, and Honorable Guy L. Fake, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 11th day of September, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 166] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

v.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and Charles I. Engard (Successor to John J. Sullivan), Special Deputy in Charge, Defendants-Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION ON REARGUMENT—Filed September 11, 1936

Before Davis and Thompson, Circuit Judges, and Fake, District Judge

DAVIS, Circuit Judge:

This case is here on reargument.

On October 5, 1931, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, closed and [fol. 167] took possession of the Franklin Trust Company of Philadelphia. Thereafter pursuant to the applicable statute of Pennsylvania he filed a certificate of taking possession of the property and business of the Franklin Trust Company in his office at Harrisburg, Pennsylvania, and a certified copy thereof in the office of the prothonotary of Philadelphia by whom it was referred or "assigned" to the Court of Common Pleas No. 5 of Philadelphia County.

The General Baking Company, a citizen of the State of New York, on April 25, 1932, filed a bill against William D. Gordon and John J. Sullivan, special deputy of Banking of Pennsylvania in charge, praying that $81,993.43 belonging to it, being part of the assets of the Trust Company, and taken in possession by Gordon, be declared a trust fund and that Gordon be directed to pay it over to the Baking Company as a prior claim. Gordon filed an answer denying that the money constituted a trust fund or that the Baking Company was entitled to priority.

In his answer he raised the question of jurisdiction of the District Court. He averred that it did not have jurisdiction to pass upon and adjudicate whatever rights the Baking Company might have in the premises. In support of this contention, when before this court, counsel for Gordon said:

"The District Court did not have jurisdiction of the Cause of Action.

The defendants contended in the court below, in their answer and in the argument, that the District Court for the Eastern District of Pennsylvania had no jurisdiction over the controversy. The Secretary of Banking took possession of the Franklin Trust Company by virtue of the Department of Banking Act of the Commonwealth of Pennsylvania of 1923 (June 15, 1923, P. L. 809, 7 P. S. 1). He is the Receiver of the Franklin Trust Company. The as- [fol. 168] sets in controversy were commercial assets belonging to the closed bank. The Bill in Equity was filed after the Secretary of Banking had taken possession of the Franklin Trust Company and had qualified as such, in accordance with the law."

The learned District Judge disposed of the question as follows:

"As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by Statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given

jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds (does not) mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority."

When the case came before us, on the first argument, we said:

"They (defendants) contend, since the Secretary of Banking had assumed control of the Trust Company and had become a statutory receiver, the State court thereby first acquired jurisdiction over the Trust Company. The District Court held that regardless of what the Secretary might be called, he was not an equity receiver and that the State court did not acquire prior jurisdiction because of the taking over of the Trust Company by the Secretary of Banking. The District Court accordingly held that it first acquired jurisdiction and continues to hold it."

[fol. 169] Neither the trial court nor we, when the case was here before, had the benefit of the opinion of the Supreme Court in the case of Gordon v. Washington, 295 U. S. 30, (decided April 1, 1935). In that case the court said that when the certificate of possession had been filed in Harrisburg in the office of the Secretary of Banking and a certified copy thereof with the prothonotary of the court of Common Pleas of Chester County, the Secretary of Banking had "the status of a receiver appointed by any court of equity of the Commonwealth". After stating that a receiver was appointed only as a means to an end, to some proper equitable relief, the court said:

"We have recently had occasion to point out that a federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed."

It further said:

"The appointment of receivers, in the circumstances, (because the bill did not pray for some equitable relief

beyond the appointment of receivers and because the appointment of receivers displaced the possession of a state officer lawfully administering property for the benefit of interested parties) was an abuse of discretion which should have been promptly set aside on the application of the petitioner. The decrees below will be reversed and the cause remanded with directions to the district court to dismiss the bills and discharge the receivers."

The procedure afforded by the state law is admittedly adequate and will be diligently and honestly followed. There [fol. 170] has never been any question about the fact of possession by Gordon of the assets, including the money here in controversy, of the Trust Company. The question before the District Court and this court was the status of Gordon and the character of his possession. We held in the case of Gordon v. Washington, supra, that he was not an equity receiver notwithstanding the fact that the statute invested him with the rights, powers and duties of such. But in the cases of Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Ominsky, 294 U. S. 186; Penn Company v. Pennsylvania, 294 U. S. 189; Gordon v. Washington, supra, the Supreme Court held that when a state has adequately provided for the liquidation of a quasi-public corporation, such as we have in the case before us, by a department of the state government, the federal court should exercise a wise discretion and surrender jurisdiction to the state court even though jurisdiction was first assumed by the federal court, and to take or attempt to take possession of the assets of an insolvent building and loan association, or insurance company from the officials, provided by the state for their liquidation, in the absence of allegations that the procedure afforded by the state law is inadequate or that it will not be diligently and honestly followed, would be an abuse of discretion.

While in the case at bar, it is not proposed to take the res out of the possession of the Secretary of Banking, the suit does, however, take the adjudication of the issue involved from the state court and interfere with an admittedly proper and adequate procedure provided by the Commonwealth for the liquidation of the Trust Company under the supervision of Common Pleas Court No. 5 of Philadelphia. After the Secretary had closed the Trust Company,

taken possession of all its assets, filed the two certificates [fol. 171] required by law and the prothonotary had assigned the cause to Common Pleas Court No. 5, under whose supervision the Trust Company was to be liquidated, the logic of all the cases cited above forbade the District Court to assume jurisdiction, but having done so, it should have dismissed the bill when the facts were brought to its attention. When the case was first argued before us, we erred in not directing the dismissal of the bill.

The decree of the District Court is reversed and the cause remanded with directions to dismiss the bill.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 172] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1934

No. 5303

General Baking Co., Appellant,

v.

Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Co., et al., Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to the said District Court with directions to dismiss the bill.

Philadelphia, September 11, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Decree, etc. Received & Filed Sep. 11, 1936. Wm. P. Rowland, Clerk.

[fol. 173] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

vs.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and Charles I. Engard (Successor to John J. Sullivan), Special Deputy in Charge, Defendants-Appellees

MEMORANDUM CORRECTING OPINION—Filed September 11, 1936

Before Davis and Thompson, Circuit Judges, and Fake, District Judge

DAVIS, Circuit Judge:

In our second Opinion filed in this cause we said that "when the case was first argued before us, we erred in not directing the dismissal of the bill"; but as a matter of fact the District Court did dismiss the bill after considering the question raised on the merits, and our order reversing the decree and direction to dismiss the bill was an oversight. The Court should have dismissed the bill without adjudicating the questions raised by the pleadings, and we should have affirmed the decree dismissing the bill with directions to refer the cause to the State Court for due procedure there without regard to what was done in the United States District Court.

The decree dismissing the bill is affirmed with directions to refer the cause to the State Court.

Endorsements: Memorandum Correcting Opinion; filed Sept. 11, 1936. Received & Filed Oct. 16, 1936. Wm. P. Rowland, Clerk.

[fol. 174] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1934

No. 5303

General Baking Company, Plaintiff-Appellant,

vs.

Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, et al., Defendants-Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court dismissing the bill of complaint in this cause be, and the same is hereby affirmed, with costs, with directions to the said District Court to refer the cause to the State Court.

Philadelphia, October 16, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Affirming Decree, etc. Received & Filed Oct. 16, 1936. Wm. P. Rowland, Clerk.

[fol. 175] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of General Baking Co., Appellant, vs. Luther A. Harr (Successor to William D. Gordon), Secretary of Banking

for the Commonwealth of Pennsylvania, et al., Appellees, No. 5303, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 16th day of October in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 194] [Stamp:] Office of the Clerk, Supreme Court, U. S., Received Dec. 10, 1936

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1933

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Defendant-Appellees

And Now, May 14th, 1936, William D. Gordon as Secretary of Banking of the Commonwealth of Pennsylvania in possession and control of the business and property of the Franklin Trust Company having resigned and Luther A. Harr having been appointed his successor, and John J. Sullivan, Special Deputy Agent in charge having resigned and Charles I. Engard having been appointed his successor, the said Luther A. Harr as Secretary of Banking of the Commonwealth of Pennsylvania in possession and control of the business and property of the Franklin Trust Company and Charles I. Engard as Special Deputy Agent are hereby substituted as parties defendant in the above cause.

Conlen, LaBrum & Beechwood, Attorneys for Plaintiff-Appellant. Bernard J. Kelley, Attorney for Defendant-Appellee.

It is hereby ordered that above substitutions be made.
J. Warren Davis, Circuit Judge.

Endorsements: Received & Filed May 15, 1936. William P. Rowland, Clerk.

[fol. 195] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Stipulation for Substitution of parties defendants-appellees, and order authorizing same, in the case of General Baking Company, Plaintiff-Appellant, vs. William D. Gordon, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Co., et al., Defendants-Appellees, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 9th day of December, in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 178] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,099. U. S. Circuit Court of Appeals, Third Circuit. Term No. 559. General Baking Company, petitioner, vs. Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed December 8, 1936. Term No. 559, O. T., 1936.

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IN THE

Supreme Court of the United States.

No. October Term, 1936.

GENERAL BAKING COMPANY,

Petitioner,

vs.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE,

Respondents.

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the General Baking Company respectfully represents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the decree of that court entered on September 28, 1934 (R. p. 160), and the decree entered, after rehearing on September 11, 1936 (R. p. 190), as corrected by the decree entered on October 16, 1936 (R. p. 192). Part I of the petition deals with the jurisdictional questions involved. Part II deals with the questions involved on the merits of the case.

PART I.

A. Questions Involved.

1. Is it error for a District Court of the United States to exercise its jurisdiction over a controversy between a claimant of certain funds in excess of $3,000.00, who is a citizen of one state, and the Secretary of Banking of another state in possession (under authority of a local statute) of a bank, who denies the claim, if all of the funds are held in escrow by a third party by stipulation of the parties entered into pursuant to an order of the District Court and part of them have never passed through the hands of either the bank or the Secretary of Banking, but were deposited directly in escrow?

2. Is it error for the Circuit Court of Appeals, after having decided the above controversy on its merits by affirming the decree of the District Court, to enter, approximately five years after the institution of suit and almost a year and three-quarters after rehearing on the merits, a second decree affirming the decree of the District Court solely on the ground that the District Court erred in exercising jurisdiction and directing the District Court to refer the cause to the state court, in which claimant's remedy may be barred by lapse of time?

B. Federal Statute Involved.

The question of the jurisdiction of the Federal Court involves Section 24 of the Judicial Code, Act of March 3, 1911, c. 231; 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

C. State Statute Involved.

The question of the jurisdiction of the Federal Court also involves the Act of Assembly of the Commonwealth of Pennsylvania of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30, 35, as amended by the Act of May 5, 1927, P. L. 762, §§ 7, 11, 12 (now repealed and supplanted by the Act of May 15, 1933, P. L. 565), §§ 701, 713 (b) and (c)).

D. Statement of the Case.

Your petitioner is General Baking Company, a citizen of the State of New York. Respondents are the Secretary of Banking of the Commonwealth of Pennsylvania and his deputy, both citizens of that Commonwealth. (The present respondents, Luther A. Harr and Charles I. Engard, are the successors in office to the original respondents, William D. Gordon and John J. Sullivan.) On October 5, 1931, respondents, under authority and by virtue of a State statute, took possession and control of the property and assets of Franklin Trust Company, a banking corporation located in Philadelphia, Pennsylvania, and a citizen of the Commonwealth of Pennsylvania, and the Secretary of Banking forthwith filed a copy of his certificate of taking possession of said bank with the Prothonotary of the Courts of Common Pleas of Philadelphia County.

On November 12, 1931, petitioner filed in the District Court of the United States for the Eastern District of Pennsylvania a bill in equity against respondents praying (1) that the court declare petitioner to be the owner of certain sums of money totalling $32,403.26, and (2) that a trust be impressed on certain other sums of money totalling $49,590.17. The $32,403.26 consisted of funds in the possession and control of certain banks in New Jersey, Delaware

and Eastern Pennsylvania of which, at the time Franklin Trust Company was taken over by respondents, $6,989.08 was represented by uncollected checks and drafts and $25,414.18 was cash (R. pp. 49, 50). The $49,590.17 consisted of funds in the hands of Franklin Trust Company of which, at the time Franklin Trust Company was taken over by respondents, $8,947.66 was represented by uncollected drafts and checks and $40,642.67 was cash (R. p. 51).

The bill also prayed for an injunction restraining the respondents from collecting the $32,403.26, which respondents claim Franklin Trust Company owns. On November 12, 1931, the District Court, after hearing, filed the following opinion (which is not a part of the record):

> "Upon the condition that defendant stipulates that a separate account will be kept of all moneys collected or received, which are subject to the claim of the plaintiff in the Bill, to the end that whatever claim or title or otherwise which the plaintiff has to said moneys may be asserted to and against the sum in the hands of the defendant, the motion for preliminary injunction is denied."

The entire $81,993.43 is now held in escrow by a third party in accordance with this ruling.

The District Court held that it had and would exercise jurisdiction of the controversy, and on June 14, 1933, entered a decree (R. p. 114) dismissing the bill (which had then been twice amended, the second time after reargument) on its merits. Petitioner thereupon appealed to the United States Circuit Court of Appeals for the Third Circuit. No cross-appeal on the jurisdictional question was taken by respondents.

The Circuit Court of Appeals likewise exercised jurisdiction over the controversy and on September 28, 1934,

entered a decree (R. p. 160) affirming the decree of the District Court. On November 21, 1934, the Circuit Court of Appeals granted (R. p. 185) petitioner's petition for a rehearing on the merits (R. pp. 163 to 183, incl.). Reargument on the merits was heard on December 15, 1934. On September 11, 1936, almost a year and three-quarters later, the Circuit Court of Appeals entered a decree (R. p. 190) *reversing* the decree of the District Court and remanding the cause with directions to dismiss the bill on the ground that the District Court was in error in exercising jurisdiction. On October 16, 1936, the Circuit Court of Appeals entered a decree (R. p. 192) correcting its decree of September 11, 1936, and *affirming* the decree of the District Court with directions to refer the cause to the State Court.

E. Reasons for Granting the Petition.

1. The decision of the United States Circuit Court of Appeals for the Third Circuit (R. pp. 186 to 190, incl.), pursuant to which it entered its decree of September 11, 1936 (R. p. 190), and its decree of October 16, 1936 (R. p. 192) is in direct conflict with the decisions of this Court in the cases of *Chicot County v. Sherwood,* 148 U. S. 529, 37 L. ed. 546, 13 S. Ct. 695 (1893); *Commonwealth Trust Company of Pittsburgh et al. v. Avery J. Bradford, Receiver of the Bank of Pittsburgh National Association, etc.,* 297 U. S. 613, 80 L. ed. 590, 56 S. Ct. 600 (1936); *Riehle, Receiver v. Margolies,* 279 U. S. 218, 73 L. ed. 669, 49 S. Ct. 310 (1929); and *McClellan v. Carland, United States District Judge for the District of South Dakota,* 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910).

2. It is of vast public importance for this Court to decide whether a Federal Court is justified in refusing to

take jurisdiction (where otherwise appropriate) over an action *in personam* against a State liquidator to establish a right to participate in the eventual distribution of the assets of the corporation being liquidated, which is one of a class affected with a public interest, on the ground that the State statute created and established a system for the liquidation of such corporations, when insolvent, and the liquidator is in possession and control of the assets of the corporation in question under the authority of said statute.

3. The decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Amos, Comptroller of State of Florida v. Trust Co. of Florida et al.*, 54 F. (2d) 286 (1931).

4. The question, whether Federal Courts may exercise jurisdiction in the first instance and determine controversies and then, when the plaintiff may be barred by reason of the lapse of time from presenting its claim in the State Courts, decline to exercise jurisdiction, is an important one and has never been decided by this Court.

5. The proper determination of the questions here presented is of paramount public importance. It is imperative at this time that this Court finally settle and delimit the boundaries of the jurisdiction of the Federal courts and the State courts in controversies involving the claims *in personam* brought by a citizen of a foreign state against state banking corporations which are being liquidated by State officers pursuant to State statutes.

PART II.

A. Questions Involved.

1. Is a Federal Court, in a controversy arising between the state liquidator of a bank and a citizen of a foreign state, bound to apply a state statute which, as interpreted by the highest court of the state, provides that, as between a customer and a bank, title to checks and drafts deposited by the customer with the bank for collection does not pass to the bank when insolvency intervenes before the bank actually receives the proceeds thereof?

2. May liquidators of an insolvent bank recover from a subagent of the bank and mingle with the bank's general funds for the benefit of its general creditors, to the exclusion of the claimant, money delivered to the subagent by the claimant for credit to the bank under an agreement with the bank to deliver to the claimant in another city an equivalent sum in cash, where the subagent had not parted with the money and the bank had not received a credit advice from the subagent until after it had been declared insolvent and taken over by the liquidators?

3. Does a trust arise where a bank, for a consideration, from time to time accepts cash from its customer's agent in one city under an agreement to forward and deliver the cash, in cash, to the customer in another city on stated days?

4. Is there an equitable assignment to a customer of cash accepted by a bank from the customer's agent in one city under an agreement to forward and deliver the cash to the customer in another city, on a stated day, if the bank fails to carry out its agreement?

5. May a district court of the United States decide a controversy on a bill in equity and answer thereto, without affirming or denying plaintiff's requests for findings of facts and conclusions of law?

B. State Statute Involved.

The merits of the case involve the Act of Assembly of the Commonwealth of Pennsylvania of June 12, 1931, P. L. 568, the short title of which is the "Bank Collection Act of 1931."

C. Statement of the Case.

This case was decided on the merits by the District Court (R. pp. 30 to 37 incl. and 109 to 113 incl.) and by the Circuit Court of Appeals in its first opinion (R. pp. 158 to 160, incl.), on bill and answer.

It appears from the pleadings that on August 25, 1925, an agreement was entered into by petitioner and Franklin Trust Company, the terms of which after an oral modification made in August, 1930, were as follows:

(a) Petitioner would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which no interest would be paid; said account to be known as a "Disbursement Account".

(b) On Wednesday of each week, petitioner would forward from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from petitioner's distributors in Philadelphia, cash,

also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week to petitioner, or its depository in New York City; said account to be known as a "Deposit Account".

(d) The Franklin Trust Company would select, subject to the approval of petitioner, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of petitioner, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of petitioner; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday and Wednesday of each week, to petitioner, or its depository in New York City.

(e) Petitioner might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby petitioner would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d)

above, for certain periods of time, these sums to be called by petitioner's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, could said funds, ever, become subject to check. (R. pp. 43, 44, 47, 48, 49.)

Petitioner, up until October 5, 1931, and Franklin Trust Company, up until September 30, 1931, both performed their obligations under the agreement (R. pp. 46, 49). On different occasions during the period from August, 1925, to October 5, 1931, petitioner, in accordance with the terms of the agreement set forth in paragraph (e) above, allowed Franklin Trust Company to use sums totalling $1,090,000.00 in its general banking business. (R. pp. 47, 49.)

On Monday, October 5, 1931, Franklin Trust Company was open for business during the entire day (R. p. 38). It then had in its possession the cash sum of $40,642.67, which it, in violation of its agreement with petitioner, failed to forward on that day to the petitioner's depository in New York City (R. p. 51). It also, in accordance with said agreement, had in its hands uncollected drafts and checks in the amount of $8,947.66 (R. pp. 50, 51). The $40,642.67, and the proceeds of the drafts and checks, were, without petitioner's consent or approval, diverted to and mingled with Franklin Trust Company's cash funds (R. pp. 51, 80). The cash funds of the Franklin Trust Company, which were augmented thereby to the extent of $49,590.17 (R. pp. 51, 81), have at all times, since Franklin Trust Company received the $40,642.67 in cash and the proceeds of the drafts and checks, been in excess of $49,590.17 (R. pp. 51, 81). There are now in respondents' possession and control assets of Franklin Trust Company sufficient to pay petitioner and all other preferred creditors (R. pp. 52, 81).

When, at the close of the business day on October 5, 1931, the Franklin Trust Company was taken over by the respondents, there was the sum of $32,403.26 in cash and uncollected drafts and checks in the possession of outlying banks in New Jersey, Delaware and Eastern Pennsylvania. This sum had been received by the said banks on October 2, 3, and 5, 1931, pursuant to the terms of the agreement between petitioner and Franklin Trust Company (R. pp. 49, 50). Receipt of the cash was noted on the books of said banks on October 5, 1931, but the drafts and checks were not collected until thereafter (R. p. 50). Credit advices from these banks pertaining thereto were not received by Franklin Trust Company but by the respondents after Franklin Trust Company had been declared insolvent and it had been taken over by respondents (R. p. 50).

The District Court held that petitioner was not the owner of the $32,403.26, and there was no ground for impressing the $49,590.17 with a trust in petitioner's favor and dismissed the bill (R. pp. 30 to 37, incl., and 109 to 114, incl.). After reargument but prior to the District Court's final decision of the case petitioner filed requests for findings of fact and conclusions of law (R. pp. 84 to 108, incl.). These were never answered and the District Court did not make findings and conclusions of its own. The Circuit Court of Appeals, in an opinion filed on September 28, 1934 (R. pp. 158 to 160, incl.), followed the decision of the District Court and affirmed its action in dismissing the bill.

On November 21, 1934, the Circuit Court of Appeals granted (R. p. 185) petitioner's petition for a rehearing on the merits (R. pp. 163 to 183, incl.). Reargument on the merits was heard on December 15, 1934. On September 11, 1936, almost a year and three-quarters later, the Circuit

Court of Appeals entered a decree (R. p. 190) *reversing* the decree of the District Court and remanding the cause with directions to dismiss the bill on the ground that the District Court was in error in exercising jurisdiction. On October 16, 1936, the Circuit Court of Appeals entered a decree (R. p. 192) correcting its decree of September 11, 1936, and *affirming* the decree of the District with directions to refer the cause to the State Court.

D. Reasons for Granting the Petition.

1. The decision of the United States Circuit Court of Appeals for the Third Circuit (R. pp. 158 to 160, incl.) affirming the decisions of the District Court of the United States for the Eastern District of Pennsylvania (R. pp. 30 to 37, incl., and 109 to 114, incl.), pursuant to which it entered its decree of September 28, 1934 (R. p. 160), is in direct conflict with the decision of the Supreme Court of the Commonwealth of Pennsylvania in the case of *Franklin Trust Company* (*claim of C. D. Tuska*), 319 Pa. 302 (1935), construing the Pennsylvania Bank Collection Act of June 12, 1931, P. L. 568.

2. Said decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decision of this Court in the case of *Commercial Bank of Pennsylvania v. Armstrong,* 148 U. S. 50, 37 L. ed. 363, 15 S. Ct. 533 (1893).

3. Said decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decision of the Court in the case of *Libby v. Hopkins,* 104 U. S. 303, 26 L. ed. 769 (1881).

E. Prayer for Writ of Certiorari.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court on a day certain, to be thereafter designated, a full and complete transcript of the record of the proceedings in said Court entitled "*General Baking Company v. Luther A. Harr* (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, and *Charles I. Engard* (Successor to John J. Sullivan), Special Deputy in Charge, number 5303, October Term, 1933," to the end that the said case may be reviewed and determined by this Court; that petitioner may have such relief as this Court may deem proper, and that the opinions and decrees of the said Circuit Court of Appeals for the Third Circuit and of the District Court for the Eastern District of Pennsylvania may be reversed by this Honorable Court.

GENERAL BAKING COMPANY,
By

GEORGE E. BEECHWOOD,
J. HARRY LABRUM,
WILLIAM J. CONLEN,
Attorneys for Petitioner.

CERTIFICATION.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States; that I am counsel for General Baking Company, the petitioner; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation, and is in my opinion well-founded in law and in fact, and should be granted.

GEORGE E. BEECHWOOD.

Brief in Support of Petition for Writ of Certiorari.

I. OPINIONS OF THE COURTS BELOW.

The first opinion of the District Court (per Judge Dickinson) was filed November 12, 1931. It was not reported and is not a part of the record, but appears in full *ante* page 4. The second opinion of the District Court (per Judge Kirkpatrick) was filed October 11, 1932 (R. pp. 30 to 37) and is reported in 9 Fed. Supp. 210. The third opinion (per Judge Kirkpatrick) was filed June 8, 1933 (R. pp. 109 to 113) and is reported in 9 Fed. Supp. 210.

The first opinion of the Circuit Court of Appeals (per Circuit Judge Davis) was filed September 28, 1934 (R. pp. 158 to 160). The second opinion (per Circuit Judge Davis) was filed September 11, 1936 (R. pp. 186 to 190). The third opinion (per Circuit Judge Davis) was filed October 16, 1936 (R. p. 191). None of the decisions of the Circuit Court are reported.

II. JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. § 347.

The jurisdiction of the Federal courts is invoked under Section 24 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

The final decree of the Circuit Court of Appeals was entered October 16, 1936. The petition for certiorari was filed December 8, 1936.

III. FACTS.

The facts are stated in the petition *ante,* pages 3 to 5, 8 to 12.

We emphasize the fact that the funds in the outlying banks in New Jersey, Delaware, and Eastern Pennsylvania were never in respondents' possession or control, and that respondents stipulated and agreed to place the funds in escrow pending a determination of the ownership thereof by the Federal Court (R. pp. 50, 90).

Respondents' counsel has personally informed petitioner's counsel that in the event claim is now or hereafter made in the State court for a preference respecting any or all of the sums in controversy, respondents will contest the same on the ground that the claim is brought too late in that Court, and your petitioner is barred therefrom. Petitioner does not admit the correctness of this position, yet, it must be considered in determining whether or not the Federal Court should exercise its jurisdiction.

IV. SPECIFICATIONS OF ERROR.

A. The Circuit Court of Appeals for the Third Circuit erred in deciding that the District Court erred in exercising jurisdiction of the instant controversy.

B. The Circuit Court of Appeals for the Third Circuit erred in refusing to follow the decision of the Supreme Court of Pennsylvania in the case of *Franklin Trust Company (Claim of C. D. Tuska)*, 319 Pa. 302 (1935), interpreting and applying the Pennsylvania Banking Act of June 12, 1931, P. L. 568.

C. The Circuit Court of Appeals for the Third Circuit erred in entering its decrees of September 28, 1934 (R. p.

160), September 11, 1936 (R. p. 190), and October 16, 1936 (R. p. 192).

D. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain assignments of error numbers 72, 74, 75, 77, 78, 79, 80, 81, 84, 85, 87 and 90 (R. pp. 145 to 152) filed by petitioner in that court.

V. ARGUMENT.

A. The Federal Court should exercise jurisdiction over this controversy.

The Circuit Court of Appeals in justification of its decision that the Federal Court should not exercise jurisdiction of the present controversy cited the decisions of this Court in *Gordon v. Washington,* 295 U. S. 30, 79 L. ed. 1282, 55 S. Ct. 584 (1936); *Pennsylvania v. Williams,* 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380 (1935); *Gordon v. Ominsky,* 294 U. S. 186, 79 L. ed. 848, 55 S. Ct. 391 (1935); *Penn General Casualty Company v. Pennsylvania,* 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386 (1935).

All of these cases involved the exercise of jurisdiction by the Federal District Court for the purpose of appointing receivers to take possession and control of the property and assets of insolvent Pennsylvania financial corporations, with power to liquidate and distribute said property and assets to creditors, thereby divesting the state statutory liquidators from the possession and control of said property and assets.

No such question arises in the instant case. This is a suit *in personam,* to establish the ownership to certain funds, and a preference in other funds. Therefore, the cited cases do not apply.

Attention is called to the fact that the property and assets of the Franklin Trust Company are vested in the respondent as Secretary of Banking for the Commonwealth of Pennsylvania pursuant to statute, and this independent of action, consent or approval of the State court. See Act of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30, 35, as amended by the Act of May 5, 1927, P. L. 762, §§ 7, 11, 12 (now repealed and supplanted by the Act of May 15, 1933, P. L.

565, §§ 504, 701, 713 (b) and (c)). Respondent was appointed by the Governor of the Commonwealth of Pennsylvania, with the consent and approval of the Senate. See Act of Apr. 9, 1929, P. L. 177, Art. II, § 207, as amended by Act of May 21, 1935, P. L. 217, § 1. Moreover, no order or decree of the State court or any other Court has been entered enjoining or restraining petitioner from prosecuting any suit against respondent.

This Court in *Pennsylvania v. Williams, supra* (294 U. S. 176, 184) speaking on this subject, stated:

> "Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See Amos v. Trust Company of Florida, C. C. A. 5th, 54 F. (2d) 286, 288."

The case of *Amos, Comptroller of State of Florida v. Trust Company of Florida,* 54 F. (2d) 286 (C. C. A. 5th, 1931), cited with approval above, clearly holds that a Liquidator of banks (similar to the Pennsylvania Secretary of Banking) for the State of Florida is subject to suit in the Federal Court, and that even though the Liquidator was confirmed by the State Court he is not a representative of the Court but of the State. The Court said at page 288:

> "Like the receiver of a national bank, the liquidator, though confirmed by a court, is not an officer of the court, but the representative of the comptroller. . . . He is in court only as he may be specially impleaded. No question of comity between courts arises."

The Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, § 713 (c) (supplanting the Act of June 15, 1923, P. L. 809, § 35) provides:

> "Any action at law or in equity, based upon a cause of action against the institution of which the secretary is receiver, which may be brought against the secretary as receiver, shall be instituted *only in the court in which the certificate of possession is filed.*" (Italics ours.)

This Court has repeatedly ruled that the Circuit Court of Appeals in the instant case should not have abdicated its jurisdiction in favor of the State court, even though this course was prescribed by the Pennsylvania statutes.

> *Chicot County v. Sherwood,* 148 U. S. 529, 37 L. ed. 546, 13 S. Ct. 695 (1893);
>
> *McClellan v. Carland, United States District Judge for the District of South Dakota,* 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910);
>
> *Commonwealth Trust Company of Pittsburg et al. v. Avery J. Bradford, Receiver of the Bank of Pittsburgh National Association, etc.,* 297 U. S. 613, 80 L. ed. 590, 56 S. Ct. 600 (1936).

In *Chicot County v. Sherwood, supra,* it was held that a Statute of the state of Arkansas requiring all claims made against a County in Arkansas on certain bonds issued by it to be presented in the County court, did not avail to preclude the Federal lower court from exercising jurisdiction of a suit against the said County brought by a citizen of a foreign state. The court stated at page 533:

> ". . . the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other States from resorting to the federal courts for the enforcement of their claims

against counties of the State, and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this. In Hyde v. Stone, 20 How. 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. . . . They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly's Administrators, 18 How. 503.' This principle has been steadily adhered to by this court."

In *McClellan v. Carland, supra* (217 U. S. 268), the Circuit Court stayed proceedings before it between citizens of different states involving the jurisdictional amount, pending a determination thereof by the State court. The Circuit Court of Appeals refused to issue a mandamus to the Judge of the lower court. This Court, on writ of certiorari, held that the Circuit Court had no right to stay the proceedings, stating at page 281:

"The case made upon the bill was within the original jurisdiction of the Circuit Court of the United States. The right of the Circuit Court to maintain such actions, notwithstanding the legislation of the State creating probate courts, has been so recently before this court as to require no further consideration now. Waterman v. Canal-Louisiana Bank, 215 U. S. 33. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have

the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the Circuit Court of the United States.

". . . It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. Chicot County v. Sherwood, 148 U. S. 529, 534."

In *Commonwealth Trust Company of Pittsburgh et al. v. Bradford, supra* (297 U. S. 613), where a Trustee of a fund was appointed by a State Probate Court and was sued in the federal District Court to establish a claim against said fund by a Receiver of a National bank, this Court stated at page 616:

"The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. . . . Property in its (trustee) possession is not in custodia legis as in case of receivers . . ."

"The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in Pennsylvania v. Williams, 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. ed. 850,

55 S. Ct. 386, supra, is not applicable. In each of those cases we found conflict between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the Federal Court should retain jurisdiction; its power generally to render judgment in personam against fiduciaries appointed by State Courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment in personam was rendered."

Even if the control and possession of the assets of the Franklin Trust Company were in the State court no question of comity would arise as this suit is *in personam* to establish a right.

In *Riehle v. Margolies*, 279 U. S. 218, 73 L. ed. 669, 49 S. Ct. 310 (1929), it was held that the appointment of a Receiver by a Federal Court on a creditor's bill gave no right to stay a suit against the Receivership debtor then pending in the State court. The language of the Court is clear and leaves no doubt as to the petitioner's right in the instant case to have the disputed facts determined in the Federal Courts. It follows (page 224):

"The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determina-

> tion of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding in personam. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88-9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor in personam may not be had in some court other than that which has control of the res. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them."

It is apparent from the above that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case that the Federal Court should not exercise jurisdiction is in conflict with the decided cases of this Court. Moreover, it is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Amos v. Trust Company of Florida, supra* (54 F. (2d) 286). Furthermore, the question presented in the foregoing petition for certiorari is one of utmost importance to the general public because of the frequent controversies upon the question of the exercise of jurisdiction of the Federal Court where a State court has concurrent jurisdiction. It is submitted, therefore, that this Court should allow the petition for certiorari.

B. The Circuit Court of Appeals for the Third Circuit Erred in Failing to Find in Favor of the Petitioner Upon the Merits.

Petitioner seeks (a) to establish the right of a preference to $8,947.50 in drafts and checks delivered to the Franklin Trust Company and *not collected* until *after* the Franklin Trust Company closed; (b) the right of ownership of $32,403.26 in cash and checks delivered by petitioner's distributors to banks in New Jersey, Delaware and Eastern Pennsylvania (hereinafter called "outlying banks") on October 2 and 3, 1931, and in their possession at the close of the business day on October 5, 1931, when the Franklin Trust Company failed—credit advices thereof were not received by the Franklin Trust Company until *after* it failed; and (c) the right of preference to $40,642.67 in cash delivered to the Franklin Trust Company by petitioner's Philadelphia distributors on October 2 and 3, 1931, for delivery in cash to petitioner's depository in New York City on October 5, 1931.

(a) Petitioner Is Entitled to the Proceeds of the Drafts and Checks in Possession of the Franklin Trust Company at the Time It Was Taken Over by Respondents, and Collected Thereafter.

The *Pennsylvania Bank Collection Act* of June 13, 1931, P. L. 568, specifically rules this case. The pertinent parts of this Act follow:

> "Except as otherwise provided by agreement . . . the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor . . ." (Section 2.)
>
> "Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special in-

dorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor . . . .'' (Section 4, third paragraph.)

"Where an agent collecting bank, other than the drawee or payor, shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefore, the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank.'' (Section 13, Clause (c).)

Under the plain language of this Act the Franklin Trust Company was an agent collecting bank, and petitioner is entitled to an immediate return of the proceeds of the checks and drafts.

The Supreme Court of Pennsylvania in *Franklin Trust Company of Philadelphia* (*Claim of C. D. Tuska*), 319 Pa. 302 (1935), has expressly so interpreted this Act.

In that case claimant on October 1, 1931, deposited a check on bank *A* with the Franklin Trust Company. Franklin Trust Company deposited the check for collection with

bank *B*. *B* sent it to bank *C*. It cleared through the New York Clearing House and was paid on October 5. Immediately the amount of the check became an unconditional credit to *B* on *C's* books. Actual payment or unconditional credit was not made by *B* to Franklin Trust Company on October 5, and at the close of that day, the Secretary of Banking took possession. The estimated date of collection was October 6, and Franklin Trust Company on two separate occasions advised claimant it would not honor his draft on it until that time. *B* paid the proceeds to the Secretary of Banking. *Held,* claimant was entitled to a preference. The Court stated at page 308:

> "Under sections 2 and 4 of that act, the trust company was clearly the agent of the depositor for its collection . . ."
>
> "No matter what the law of this Commonwealth was prior to the Bank Collection Act of 1931 or what the law may be in other jurisdictions, this act is conclusive of this controversy. The trust company was 'an agent collecting bank' within the meaning of section 13 (c) of that act. The stipulation of the parties is, *in the very words of this act,* that the item 'was neither paid nor remitted to claimant in cash or by an unconditional credit given on the books of the Franklin Trust Company or on the books of any other bank prior to the closing of the bank.' It follows that the assets of the collecting agent bank were impressed with a trust in favor of the appellee for the amount of the proceeds and that therefore the appellee is entitled to a prior claim upon such assets." (Italics by the Court.)

Under the *Pennsylvania Bank Collection Act* and the cited case decided by the highest Court of Pennsylvania, petitioner is unquestionably entitled to the sum of $8,947.50,

proceeds of checks and drafts delivered to the Franklin Trust Company for collection and uncollected until after it closed. The Circuit Court of Appeals for the Third Circuit, in contradiction to the cited act and decision, held that petitioner was not entitled to the said $8,947.50.

It is submitted that this Court should grant the petition of certiorari to review this decision in view of the fact that it is in conflict with the statute and decision of the highest Court of the Commonwealth of Pennsylvania.

(b) Upon Insolvency, the Franklin Trust Company Lost Its Right to Receive the Funds in the Outlying Banks, and Petitioner Became Entitled to Immediate Possession Thereof.

At the close of the business day on October 5, 1931, when respondents took possession of the assets and property of the Franklin Trust Company, the outlying banks had in their possession $32,403.26 in cash and drafts and checks for collection for forwarding to petitioner's depository in New York City via the Franklin Trust Company. At that time, however, the Franklin Trust Company had not received any notice nor made any record on its books that the funds had been received by the outlying banks. Notices from the outlying banks were received only after respondents had taken possession of the Trust Company. Consequently, these funds never came into the possession of the Franklin Trust Company.

Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 37 L. ed. 363, 15 S. Ct. 533 (1893) rules that petitioner is the owner of said fund. In the cited case, the Commercial Bank of Pennsylvania sent paper for collection and credit to the Fidelity Bank in Cleveland, the balance to be

remitted tri-monthly. The Fidelity Bank agreed to "collect at par all points west of Pennsylvania and remit on the first, eleventh and twenty-first of each month" in consideration of the temporary use of the funds. Prior to its failure, the Fidelity Bank had sent some of the paper to subagents for collection, and they had collected it and unconditionally credited the Fidelity Bank with the amounts collected before it had become insolvent. This Court held that the funds in the sub-agent banks were the property of, and belonged to, the Commercial Bank of Pennsylvania.

This Court stated at pages 56 and 57:

> "That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. . . . If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand, such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected. Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same . . . No mere bookkeeping between the Fidelity and its subagent

could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction."

It is apparent that petitioner is the owner of the funds in cash, and proceeds from drafts and checks, delivered to the outlying banks and now held in escrow. Despite the decision of this Court in *Commercial Bank of Pennsylvania v. Armstrong, supra,* the Circuit Court of Appeals for the Third Circuit, failed to award the said fund to petitioner.

It is submitted, therefore, that this Court should allow the writ of certiorari in this case in view of the fact that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with the said decision of this Court.

(c) Petitioner Is Entitled to a Preference in $40,642.67 in the Franklin Trust Company.

The Franklin Trust Company expressly agreed to accept the cash sum of $40,642.67 solely for transfer and delivery in cash to petitioner's depository in New York City (R. pp. 50, 51 and 80). It had no right whatsoever to use the money itself or do anything other than deliver it to petitioner in New York. It failed to apply the cash to the purpose for which it was accepted (R. pp. 51 and 80). This money has been traced into a specific fund, namely, the cash fund of the Franklin Trust Company, which was augmented thereby, and at all times has been, and now is, in excess of the total amount of petitioner's claims (R. pp. 51, 52, 81 and 82).

That this constituted the Franklin Trust Company a trustee was forcefully enunciated by this Court in *Libby v. Hopkins,* 104 U. S. 303, 26 L. ed. 769 (1881). In that case,

Stewart and Company were bankers and merchants. Hopkins maintained a cash account and a merchandising account with them. His remittances were credited in his cash account. He paid for merchandising by draft. He borrowed $100,000.00 from Stewart and Company, giving his demand note, secured by several mortgages. He paid $25,000.00, $10,000.00, $17,000.00, $10,000.00 and $48,025.00, at various times, with instructions that same be applied upon payment of his note. The first three payments were so applied; the last two were not. Thereafter Hopkins failed, owing Stewart and Company $231,515.00, on account and unsecured. Stewart and Company endeavored to foreclose the mortgages, claiming the full principal of the note, less the first three payments. The court stated at page 308:

> ". . . And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.
>
> "Whether or not he had the right to direct the application, is immaterial. There was no legal obstacle to the application as directed. The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.
>
> "They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.

"Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. . . .

"But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting. . . .

". . . The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees."

Under the decision of this Court in the case of *Libby v. Hopkins, supra,* petitioner was entitled to the said sum of $40,642.67. The Circuit Court of Appeals for the Third Circuit in conflict with that decision held that petitioner was not entitled to this fund. It is submitted, therefore, that this Court should allow the petition for certiorari.

VI. CONCLUSION.

It has been shown that (1) the decision of the Circuit Court of Appeals for the Third Circuit that the District Court should not have exercised Federal jurisdiction is in conflict with the prior decisions of this Court and the decision of the Circuit Court of Appeals for the Fifth Cir-

cuit; also that this question of the proper exercise of Federal jurisdiction is of great public interest; (2) the decision of the Circuit Court of Appeals that petitioner was not entitled to recover on the merits was in conflict with the Statutes and decisions of the highest court of the Commonwealth of Pennsylvania and prior decisions of this Court.

It is submitted, therefore, that this Court should allow the petition and order the writ of certiorari to issue to the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

No. 559. **October Term, 1936.**

GENERAL BAKING COMPANY (Plaintiff-Appellant in the Courts Below),

Petitioner,

v.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and CHARLES I. ENGARD (Successor to John J. Sullivan), Special Deputy in Charge (Defendants-Appellees in the Courts Below),

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief on Behalf of Petitioner.

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IN THE

Supreme Court of the United States.

No. 559. October Term, 1936.

GENERAL BAKING COMPANY,

Petitioner,

vs.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

I. OPINIONS OF THE COURTS BELOW.

The first opinion of the District Court of the United States for the Eastern District of Pennsylvania (per Judge Dickinson) was filed on November 12, 1931. It has not been reported and is not printed in the record, but it appears in full *post* on pages 8, 9 of this brief. The second opinion of the District Court (per Judge Kirkpatrick) was filed on October 11, 1932. It is reported in 9 Fed. Supp. 210, and

appears in the record at pages 21 to 27, inclusive. The third opinion of the District Court (per Judge Kirkpatrick) was filed on June 8, 1933. It is reported in 9 Fed. Supp. 210, 214, and appears in the record at pages 73 to 76, inclusive.

The first opinion of the United States Circuit Court of Appeals for the Third Circuit (per Circuit Judge Davis) was filed on September 28, 1934. It has not been reported but it appears in the record at pages 112 to 114, inclusive. The second opinion of the Circuit Court (per Circuit Judge Davis) was filed on September 11, 1936. It is reported in 85 F. (2d) 932, and appears in the record at pages 134 to 138, inclusive. The third opinion of the Circuit Court (per Circuit Judge Davis) was filed on October 16, 1936. It is reported in 85 F. (2d) 932, 934, and appears in the record at page 139.

II. JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. § 347.

The jurisdiction of the Federal courts is invoked under Section 24 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

The three final decrees of the Circuit Court of Appeals were entered on September 28, 1934, September 11, 1936 and October 16, 1936, respectively. The petition for certiorari was filed on December 8, 1936. Certiorari was granted on January 18, 1937.

III. STATEMENT OF THE CASE.

This case is before this Court on certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the decree of that court entered on September 28, 1934 (R. 114), and the decree entered, after rehearing, on September 11, 1936 (R. 138), as corrected by the decree entered on October 16, 1936 (R. 140). The first of these decrees affirmed the decree of the District Court of the United States for the Eastern District of Pennsylvania entered on June 14, 1933 (R. 77), which dismissed petitioner's bill in equity on the merits. The second decree *reversed* the decree of the District Court on the ground that the District Court should not have exercised jurisdiction over the controversy, and remanded the cause with directions to dismiss the bill. This decree was not in order because the District Court had already dismissed the bill. Therefore, the Circuit Court of Appeals entered its third decree which affirmed the decree of the District Court with directions to refer the cause to the State Court.

Petitioner is General Baking Company, a citizen of New York. Respondents are the Secretary of Banking of the Commonwealth of Pennsylvania and his special deputy, both Pennsylvania citizens. [The individuals who are Secretary of Banking and special deputy at the present time are the successors in office to the individuals who were defendants in the District Court (R. 142).] At the time of institution of the present suit respondents were, under and by virtue of a Pennsylvania statute, in possession and control of the property and assets of Franklin Trust Company, a Pennsylvania banking corporation located in Philadelphia, and the Secretary of Banking had filed a copy of his certificate of taking possession of said bank with the

Prothonotary of the Courts of Common Pleas of Philadelphia County (R. 27 and 47).

This case was heard by the District Court on bill and answer. The bill and answer were twice amended and the bill in its final form, alleges the facts to be as hereinafter set forth.

Petitioner is a New York corporation with its principal place of business in New York City. It is engaged in selling bread, cakes and similar food products throughout the United States (R. 27). In June, 1925, Franklin Trust Company began negotiations with petitioner with regard to the collection of the proceeds of sales made by petitioner's Eastern Pennsylvania, New Jersey and Delaware distributors, which finally resulted, after some correspondence between the parties, in an oral agreement (R. 28 to 31, incl., 39 to 42, incl.). This oral agreement was entered into on August 25, 1925, and its terms and conditions were as follows:

> (a) Petitioner would open a checking account with Franklin Trust Company and maintain therein an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account".
>
> (b) On Wednesday on each week, petitioner would forward from its New York office to Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;
>
> (c) Franklin Trust Company would accept from petitioner's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of

forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to petitioner, or its depository, in New York City; said account to be known as a "Deposit Account".

(d) Franklin Trust Company would select, subject to the approval of petitioner, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of petitioner, cash, drafts and checks to be credited to, and subject to the check of Franklin Trust Company only, but earmarked as the funds of petitioner; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to petitioner in New York City, and a credit advice to be sent immediately to Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to petitioner, or its depository, in New York City.

(e) Petitioner might, at the special request and for the sole benefit of Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with Franklin Trust Company whereby petitioner would allow Franklin Trust Company to use certain sums from those accepted by it for the purposes set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by petitioner's

check only, instead of being forwarded by Franklin Trust Company. Under such agreements, and no other, would said fund, ever, become subject to check. (R. 31, 32.)

On Monday, September 7, 1925, Franklin Trust Company delivered to petitioner in New York City a cashier's check of a New York Bank instead of actual cash, and petitioner objected (R. 33, 43). Franklin Trust Company thereupon acknowledged its error and stated that thereafter the transfer would be effected each Monday morning in cash funds in accordance with the agreement of the parties (R. 33, 43, 44A).

On September 27, 1925, Franklin Trust Company advised petitioner that, inasmuch as collections made by the correspondent banks on Thursday were noted on said banks' books on Friday and advices thereof were received by, and noted on the books of Franklin Trust Company on Saturday, the last out-of-town collections to be included in the cash forwarded each Monday to petitioner in New York City would be those received by the correspondent banks on the preceding Thursday. This met with petitioner's approval (33, 34, 45, 46A).

In August, 1930, the agreement between petitioner and Franklin Trust Company was modified in two particulars: (a) thereafter no interest would be paid on the checking account and (b) Franklin Trust Company would each week make a delivery of cash in New York City to petitioner, or its depository, on Wednesday as well as Monday (R. 35, 36).

Petitioner, up until October 5, 1931, and Franklin Trust Company, up until September 30, 1931, both performed their obligations under the agreement (R. 34, 36).

Correspondent banks in New Jersey, Delaware and Eastern Pennsylvania were selected by Franklin Trust Company and approved by petitioner. (R. 32, 33.) On different occasions during the period from August, 1925, to October 5, 1931, petitioner, in accordance with the terms of the agreement set forth in clause (e), allowed Franklin Trust Company to use sums totalling $1,090,000.00 in its general banking business. (R. 34, 36.)

On Friday, October 2, 1931, there were delivered to Franklin Trust Company for collection, checks and drafts totalling $1,005.52, and on Saturday, October 3, 1931, checks and drafts totalling $8,747.66. The proceeds of these checks and drafts were to be forwarded to petitioner's depository in New York City in accordance with the provisions of the agreement set forth in Clause (c) (R. 37).

On the same dates there was delivered to Franklin Trust Company cash totalling $40,642.67. This cash was likewise to be forwarded to petitioner's depository in New York City in accordance with the provisions of Clause (c) (R. 37).

On September 26 and October 2, 3 and 5, 1931, there were delivered to the correspondent banks cash, checks and drafts in the total amount of $32,403.26. This cash and the checks and drafts were delivered to and accepted by the correspondent banks pursuant to, and for the purposes set forth in Clause (d) of the agreement. Receipt thereof was noted on the books of the correspondent banks on October 5, 1931 (R. 36, 37).

On Monday, October 5, 1931, at the close of the business day, respondents took possession and control of the business and assets of Franklin Trust Company (R. 27, 28). At that time $199.84 in amount of the checks and drafts

which had been delivered to Franklin Trust Company on October 2, 1931, had been collected and were represented by cash (R. 37). Neither this cash nor the cash which had been delivered to Franklin Trust Company on October 2 and 3, 1931, a total of $40,842.51, was ever forwarded to New York City (R. 38).

The checks and drafts delivered to Franklin Trust Company on October 3, 1931, were not collected until on or after October 6, 1931 (R. 37). The proceeds of these checks, together with the $40,842.51 in cash, were diverted to and mingled with the cash funds of Franklin Trust Company without petitioner's consent or approval (R. 38). Franklin Trust Company's cash funds were thereby augmented to the extent of the sum of the amount of these proceeds plus $40,842.51, or $49,590.17 (R. 38). Said cash funds have been, at all times since Franklin Trust Company accepted said cash and said checks and drafts, in excess of $49,590.17 (R. 38).

Credit advices of the receipt of the cash, checks and drafts totalling $32,403.26 by the correspondent banks were not received by Franklin Trust Company until on or after October 6, 1931 (R. 36, 37). When respondents attempted to collect this $32,403.26 from the correspondent banks, petitioner filed a motion for an injunction to restrain them from doing so. After hearing argument on the motion Judge Dickinson of the District Court filed the following opinion:

> "Upon the condition that defendant stipulates that a separate account will be kept of all moneys collected or received, which are subject to the claim of the plaintiff in the Bill, to the end that whatever claim or title or otherwise which the plaintiff has to said

moneys may be asserted to and against the sum in the hands of the defendant, the motion for preliminary injunction is denied."

The $32,403.26 is now held in escrow by a third party under a stipulation entered into in accordance with this opinion. The $49,590.17 has also been placed in escrow. These funds, together with the assets of Franklin Trust Company in respondents' possession and control, are sufficient to pay petitioner and all other preferred claimants in full (R. 38).

The Amended Bill of Complaint as Amended concludes with a prayer (1) that the court declare petitioner to be the owner of the $32,403.26, and (2) that the court declare the $49,590.17 to be impressed with a trust in petitioner's favor (R. 38, 39).

None of the averments of the Amended Bill of Complaint as Amended are denied except the averment that petitioner has no plain, adequate and complete remedy at law. Some of the averments are "qualified" to the extent hereinafter set forth.

In reply to the averments setting forth those terms and conditions of the agreement between petitioner and Franklin Trust Company which are described in paragraphs (c), (d) and (e) above, respondents' answer alleges:

> (c) Petitioner agreed to open a "deposit account" in Franklin Trust Company, wherein all cash, checks and drafts received by petitioner's three Philadelphia plants were to be deposited, the deposits to be credited to petitioner, advices of each deposit to be forwarded to petitioner's offices in New York City, and, on Monday of each week, the balance in the account (as augmented by the funds received under the terms and conditions

hereinafter set forth) to be forwarded by Franklin Trust Company to petitioner, or its depository, in New York City.

(d) Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania and elsewhere, with banks of its selection, said banks to be approved by petitioner, to enable the cashiers of petitioner's distributors in said towns to deposit cash, checks and drafts therein, the cash, checks and drafts to be credited to the account of Franklin Trust Company, subject only to withdrawal by check of Franklin Trust Company, an immediate written acknowledgment of the receipt thereof to be mailed to petitioner, and an immediate credit advice to be forwarded to Franklin Trust Company, all said cash, checks and drafts to be credited to petitioner's "deposit account" in Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to petitioner, or its depository, in New York City.

(e) Respondents have no knowledge that the agreement as set forth in the corresponding paragraph of the bill was entered into for the sole benefit of Franklin Trust Company and, if the same is material, demand proof thereof.

Under the terms and conditions of the agreement between petitioner and Franklin Trust Company, as set forth in the bill and qualified in the answer, Franklin Trust Company was authorized to retain and use all money deposited in Franklin Trust Company or the correspondent banks, including moneys deposited in accordance with the provisions set forth in para-

graphs (c) and (d) for those periods of time during which said moneys were in the possession of Franklin Trust Company and/or the correspondent banks, and there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein (R. 48, 49).

In reply to the averment in the bill that the $49,590.17 was diverted to and mingled with the cash funds of Franklin Trust Company without petitioner's consent or approval, the answer admits that it was mingled without first obtaining petitioner's *specific* consent or approval. The answer then avers that under the terms and conditions of the agreement as set forth in the bill and "qualified" by the answer, consent and approval were given by petitioner to Franklin Trust Company to divert to and mingle with its general cash funds, the cash and proceeds of drafts and checks deposited with it (R. 52, 53).

The District Court held that it had and would exercise jurisdiction of the controversy. No cross appeal from this decision was filed by respondents. On the merits the District Court held that petitioner was not the owner of the $32,403.26 and that there was no ground for impressing the $49,590.17 with a trust in petitioner's favor, and dismissed the bill. After reargument, but prior to the District Court's final decision of the case, petitioner filed requests for findings of fact and conclusions of law (R. 54 to 73 incl.). These were never answered, and the District Court did not make findings and conclusions of its own. The Circuit Court of Appeals, in its opinion filed on September 28, 1934, followed the decision of the District Court and affirmed its action in dismissing the bill.

On November 21, 1934 the Circuit Court of Appeals granted (R. 133) petitioner's petition for a rehearing on the merits (R. 115 to 131 incl.). Reargument on the merit was held on December 15, 1934. Not until September 11, 1936, almost a year and three-quarters later, did the Circuit Court of Appeals enter its decree reversing the decree of the District Court and remanding the cause with directions to dismiss the bill on the ground that the District Court was in error in exercising jurisdiction. On October 16, 1936 the Circuit Court of Appeals entered its decree correcting its decree of September 11, 1936 and affirming the decree of the District Court with directions to refer the cause to the State Court.

IV. SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals for the Third Circuit erred in deciding that the District Court erred in exercising jurisdiction of the instant controversy.

2. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 78 in that court. The assignment reads:

> "78. The Learned Chancellor erred in refusing to affirm the plaintiff's seventh request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> '7. Full title to, and ownership of, the drafts and checks, amounting to $9,753.18, delivered by plaintiff's distributors on October 2 and 3, 1931, for collection by the Franklin Trust Company, for the purpose of forwarding and delivering the proceeds thereof to plaintiff in New York, remained in plaintiff until the same were collected by defendants on or after October 6, 1931.' " (R. 104)

3. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 79 in that Court. The assignment reads:

> "79. The Learned Chancellor erred in refusing to affirm the plaintiff's eighth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> > '8. The Franklin Trust Company was not a purchaser for value of any of the drafts and checks, amounting to $9,753.18, delivered to it for collection by plaintiff's distributors on October 2 and 3, 1931.' " (R. 105)

4. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 80 in that Court. The assignment reads:

> "80. The Learned Chancellor erred in refusing to affirm the plaintiff's ninth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> > '9. The collection by defendants of the proceeds of the drafts and checks, delivered by plaintiff's distributors to the Franklin Trust Company, on October 2 and 3, 1931, in the amount of $8,747.50, and their subsequent failure to forward and deliver the proceeds to plaintiff in New York City, constituted the defendants trustees ex maleficio for that amount.' " (R. 105)

5. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 81 in that Court. The assignment reads:

> "81. The Learned Chancellor erred in refusing to affirm the plaintiff's tenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

'10. Under Section 13 of the Pennsylvania Act of June 12, 1931, P. L. 572, plaintiff has a right to the immediate payment of $8,747.50, the proceeds of drafts and checks accepted by the Franklin Trust Company for collection and collected by defendants subsequent to the closing of the Franklin Trust Company.' " (R. 105)

6. The Circuit Court of Appeals for the Third Circuit erred in refusing to follow the decision of the Supreme Court of Pennsylvania in the case of *Franklin Trust Company (Claim of C. D. Tuska)*, 319 Pa. 302 (1935), interpreting and applying the Pennsylvania Banking Act of June 12, 1931, P. L. 568.

7. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 85 in that Court. The assignment reads:

"85. The Learned Chancellor erred in refusing to affirm the plaintiff's fourteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

'14. The acceptance from plaintiff's agents by the correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania, of cash, also drafts and checks for collection, for the purpose of crediting the same to the Franklin Trust Company in Philadelphia, for forwarding and delivering the cash, together with the proceeds of the checks and drafts, amounting to $32,403.26, to plaintiff in New York City, created an express trust thereof.' " (R. 106)

8. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 84 in that Court. The assignment reads:

"84. The Learned Chancellor erred in refusing to affirm the plaintiff's thirteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

> '13. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were the agents of plaintiff.' " (R. 106)

9. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 72 in that Court. The assignment reads:

"72. The Learned Chancellor erred in refusing to affirm the plaintiff's first request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

> '1. The acceptance by the Franklin Trust Company from plaintiff's distributors in Philadelphia, of the cash, also the drafts and the checks for collection, for the purpose of forwarding and delivering the cash, together with the proceeds of the drafts and checks, amounting to $49,590.17, to the plaintiff in New York City, created an express trust thereof.' " (R. 103)

10. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 74 in that Court. The assignment reads:

"74. The Learned Chancellor erred in refusing to affirm the plaintiff's third request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

> '3. There was an equitable assignment to plaintiff of cash funds in the possession of the Franklin Trust Company in the amount of $40,642.67.' " (R. 103)

11. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 75 in that Court. The assignment reads:

> "75. The Learned Chancellor erred in refusing to affirm the plaintiff's fourth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:
>
> > '4. Plaintiff has an equitable lien on the fund of $49,590.17, in defendants' possession, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.'" (R. 103, 104)

12. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain petitioner's assignment of error number 94 in that court. The assignment reads:

> "94. The Learned Chancellor erred in entering as a final decree in this cause, on the fourteenth day of June, A. D. 1933, the following:
>
> > 'This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, Adjudged and Decreed as follows:
> >
> > 'That plaintiff's Bill in Equity be dismissed, with costs to be paid by plaintiff.'" (R. 108)

13. The Circuit Court of Appeals for the Third Circuit erred in entering its decree of September 28, 1934. The decree reads:

> "This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. WARREN DAVIS, Circuit Judge."
(R. 114)

14. The Circuit Court of Appeals for the Third Circuit erred in entering its decree of September 11, 1936. The decree reads:

"This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and same is hereby reversed, with costs, and the cause remanded to the said District Court with directions to dismiss the bill.

Philadelphia, September 11, 1936.

J. WARREN DAVIS, Circuit Judge."
(R. 138)

15. The Circuit Court of Appeals for the Third Circuit erred in entering its decree of October 16, 1936. The decree reads:

"This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree

of the said District Court dismissing the bill of complaint in this cause be, and the same is hereby affirmed, with costs, with directions to the said District Court to refer the cause to the State Court.

Philadelphia, October 16, 1936.

J. WARREN DAVIS, Circuit Judge."
(R. 140)

V. ARGUMENT.

A. The Federal Court Should Exercise Jurisdiction Over This Controversy.

(a) Petitioner is entitled to have this controversy decided by the Federal Court because the parties are citizens of different states.

(Specifications of Error Nos. 1, 14, 15.)

Petitioner is a citizen of the State of New York. Respondents and Franklin Trust Company are citizens of the Commonwealth of Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. The District Court, therefore, had jurisdiction under Section 24 of the Judicial Code, Act of March 3, 1911, c. 231; 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

It has long been established that a Federal Court should not, with regard to controversies such as the instant one, abdicate its jurisdiction in favor of a State court. This is true even though a State statute provides that the State court shall be the only forum in which such suits may be instituted.*

Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 546, 13 S. Ct. 695 (1893);

McClellan v. Carland, United States District Judge for the District of South Dakota, 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910).

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*The Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, § 713 (c) contains such a provision. Section 713 (c) of that act reads:

"Any action at law or in equity, based upon a cause of action against the institution of which the secretary [of Banking] is receiver, which may be brought against the secretary as receiver, shall be instituted *only in the court in which the certificate of possession is filed.*" (Italics supplied.)

In *Chicot County v. Sherwood, supra,* it was held that a Statute of the state of Arkansas requiring all claims made against a County in Arkansas on certain bonds issued by it to be presented in the County court, did not avail to preclude the Federal lower court from exercising jurisdiction of a suit against the County brought by a citizen of a foreign state. Mr. Justice Jackson, who delivered the opinion of the court, stated at pages 533; 534:

> ". . . the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other States from resorting to the federal courts for the enforcement of their claims against counties of the State, and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this. In Hyde v. Stone, 20 How. 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power . . . They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly's Administrators, 18 How. 503.' This principle has been steadily adhered to by this court."

In *McClellan v. Carland, supra,* (217 U. S. 268), the Circuit Court stayed proceedings before it between citizens of different states pending a determination by the State court of title and interest in certain property involved in

the controversy. The Circuit Court of Appeals refused to issue a mandamus to the Judge of the lower court ordering him to proceed with the case. This Court, on writ of certiorari, held that the Circuit Court had no right to stay the proceedings. Mr. Justice Day, who delivered the opinion of the court, stated, at page 281:

> "The case made upon the bill was within the original jurisdiction of the Circuit Court of the United States. The right of the Circuit Court to maintain such actions, notwithstanding the legislation of the State creating probate courts, has been so recently before this court as to require no further consideration now. *Waterman v. Canal-Louisiana Bank,* 215 U. S. 33. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the Circuit Court of the United States.
>
> ". . . It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County v. Sherwood,* 148 U. S. 529, 534."

In this connection the language of Mr. Justice Catron in his opinion in *Rundle et al. v. Delaware and Raritan*

Canal Company, 55 U. S. 80, 14 L. ed. 335 (1852) is particularly appropriate. He there said (page 95):

> "If the United States courts could be ousted of jurisdiction, and citizens of other States and subjects of foreign countries be forced into the State courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the Constitution; and, in many cases, be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations, in local courts, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it."

Petitioner instituted the present suit on November 12, 1931, shortly after Franklin Trust Company was taken over by respondents. The decree of the Circuit Court of Appeals deciding the controversy on the ground of discretion in exercising jurisdiction was entered, in its final form, on October 16, 1936, almost five years later. Respondents' counsel has personally informed petitioner's counsel that, in the event claim is now or hereafter made in the State court for a preference respecting any or all of the sums in controversy, respondents will contest the same on the ground that the claim is brought too late and petitioner is barred. The correctness of this position is not admitted; nevertheless, these circumstances should be given serious consideration in determining whether or not the Circuit Court of Appeals properly remanded the cause to the District Court with directions to refer it to the State court.

It is submitted that the District Court had jurisdiction of the present controversy and that the Circuit Court of Appeals erred in holding that the District Court abused its discretion in exercising jurisdiction.

(b) It was proper for the District Court to exercise jurisdiction over the present controversy because the suit is in personam.

(Specifications of Error Nos. 1, 14, 15.)

The Circuit Court of Appeals, in holding that the District Court was in error in retaining jurisdiction over the present controversy, cited as the basis for its conclusion, the decisions of this Court in *Gordon v. Washington,* 295 U. S. 30, 79 L. ed., 1282, 55 S. Ct. 584 (1936); *Pennsylvania v. Williams,* 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380 (1935); *Gordon v. Ominsky,* 294 U. S. 186, 79 L. ed. 848, 55 S. Ct. 391 (1935); *Penn General Casualty Company v. Pennsylvania,* 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386 (1935).

All of these cases, however, involved the question of the propriety of the action of a Federal District Court in exercising jurisdiction by appointing a receiver to take possession and control of the property and assets of insolvent Pennsylvania financial corporations for the purpose of liquidating and distributing said property and assets to creditors, and thereby divesting the state statutory liquidators from the possession and control of said property and assets.

No such question is involved in the present case. This is a suit *in personam.* It seeks to establish the ownership of certain funds and the right to a preference in others. The cited cases, therefore, do not apply. This distinction has been recognized and expressed by this Court in two recent decisions:

> *Commonwealth Trust Company of Pittsburg et al. v. Avery J. Braddford, Receiver of the Bank of Pittsburgh National Association,*

etc., 297 U. S. 613, 80 L. ed. 590, 56 S. Ct. 600 (1936);

Riehle v. Margolies, 279 U. S. 218, 73 L. ed. 669, 49 S. Ct. 310 (1929).

In *Commonwealth Trust Company of Pittsburgh et al. v. Bradford, supra*, where a Trustee of a fund was appointed by a State Probate Court and was sued in the Federal District Court to establish a claim against said fund by a Receiver of a National bank, Mr. Justice McReynolds, who delivered the opinion of this Court, stated, at pages 619, 620:

> "The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. . . . Property in its (the trustee's) possession is not in custodia legis as in case of receivers . . ."

> "The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in Pennsylvania v. Williams, 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386, supra, is not applicable. In each of those cases we found conflict between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the Federal Court should retain jurisdiction; its power generally to render judgment in personam against fiduciaries appointed by State

Courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment in personam was rendered."

In *Riehle v. Margolies, supra* (279 U. S. 218), it was held that the appointment of a Receiver by a Federal Court on a creditor's bill gave no right to stay a suit against the Receivership debtor then pending in the State court. The language of Mr. Justice Brandeis, who delivered the opinion of this Court in that case, is clear and leaves no doubt as to the petitioner's right in the instant case to have the disputed facts determined in the Federal Courts. It follows (page 224):

"The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88-9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the exist-

ence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res*. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them."

It is submitted that it was proper for the District Court to retain jurisdiction of the present controversy for the purpose of determining the character and amount of petitioner's claim.

(c) No question of comity arises in the present case.

(Specifications of Error Nos. 1, 14, 15.)

Respondents are in possession and control of the property and assets of Franklin Trust Company solely by authority of statute and entirely without action, consent or approval on the part of any State court. See Act of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30, 35, as amended by the Act of May 5, 1927, P. L. 762, §§ 7, 11, 12 (now repealed and supplanted by the Act of May 15, 1933, P. L. 565, §§ 504, 701, 713 (b) and (c). (These sections of these acts are set out in full in the Appendices to this Brief at pages 65 to 76 incl.) Respondent, the Secretary of Banking, was appointed by the Governor of the Commonwealth of Pennsylvania, with the consent and approval of the Senate. See Act of Apr. 9, 1929, P. L. 177, Art. II, § 207, as amended by Act of May 21, 1935, P. L. 217, § 1. Moreover, no order or decree of the State court or any other Court has been entered enjoining or restraining petitioner from prosecuting any suit against respondents.

In *Pennsylvania v. Williams*, supra (294 U. S. 176), Mr. Justice Stone, who delivered the opinion of the court, stated at page 184:

> "Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See Amos v. Trust Co. of Florida, C. C. A. 5th, 54 F. (2d) 286, 288."

The case of *Amos, Comptroller of State of Florida v. Trust Company of Florida*, 54 F. (2d) 286 (C. C. A. 5th, 1931), cited with approval above, clearly holds that a Liquidator of banks (similar to the Pennsylvania Secretary of Banking) for the State of Florida is subject to suit in the Federal Court, and that even though the Liquidator was confirmed by the State Court he is not a representative of the Court but of the State. Mr. Justice Sibley, who delivered the opinion of the Court, said at page 288:

> "Like the receiver of a national bank, the liquidator, though confirmed by a court, is not an officer of the court, but the representative of the comptroller. . . . He is in court only as he may be specially impleaded. No question of comity between courts arises."

The Court's attention is respectfully directed to the following cases on this point:

Lyon v. McKeefrey et al., 171 Fed. 384 (C. C. A., 3rd, 1909);

Farrell v. Stoddard, Superintendent of Insurance of New York, et al., 1 F. (2d) 802 (D. C., N. D. N. Y., 1924);

In the Matter of Union Bank of Brooklyn, in Liquidation, 176 App. Div. 477, 163 N. Y. S. 485 (1917);

Lyons v. Bank of Discount of City of New York, 154 Fed. 391 (C. C., S. D. N. Y., 1907);

Schofield v. Palmer et al., 134 Fed. 753 (C. C., W. D. Va., 1904);

Allen, Bank Commissioner, et al. v. United States, 285 Fed. 678 (C. C. A., 1st, 1923);

Commonwealth v. Commissioner of Banks in re Prudential Trust Company, 240 Mass. 244 (1922).

In this connection it is most important to keep in mind the fact that the funds in the correspondent banks in New Jersey, Delaware and Eastern Pennsylvania never came into respondents' possession or control but were placed in escrow, where they still remain. Likewise the cash and proceeds of checks and drafts which were delivered directly to Franklin Trust Company have been placed in escrow.

It is submitted that no question of comity arises in the present case and that the Federal Courts should exercise jurisdiction thereover.

B. The Circuit Court of Appeals for the Third Circuit Erred in Failing to Find in Favor of Petitioner upon the Merits.

Petitioner seeks to establish (a) the right to a preference in $8,747.66 in drafts and checks delivered to Franklin Trust Company and *not collected* until *after* Franklin Trust Company closed; (b) the right of ownership of $32,403.26 in cash and checks delivered by petitioner's distributors to the correspondent banks in New Jersey, Delaware and

Eastern Pennsylvania on September 26, October 2, 3 and 5, 1931, and in their possession at the close of the business day on October 5, 1931, when the Franklin Trust Company failed—credit advices thereof not having been received by Franklin Trust Company until *after* it failed; and (c) the right to a preference in $40,842.51 in cash delivered to Franklin Trust Company by petitioner's Philadelphia distributors on October 2 and 3, 1931, for delivery in cash to petitioner's depository in New York City on October 5, 1931.

(a) Petitioner is entitled to the proceeds of the drafts and checks in possession of Franklin Trust Company at the time it was taken over by respondents, and collected thereafter.

(Specifications of Error Nos. 2, 3, 4, 5, 6, 12, 13.)

The Pennsylvania Bank Collection Act of June 13, 1931, P. L. 568, specifically rules this case. The pertinent parts of this Act follow:

> "Except as otherwise provided by agreement . . . the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor . . ." (Section 2.)
>
> "Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special indorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor . . ." (Section 4, third paragraph.)
>
> "Where an agent collecting bank, other than the drawee or payor, shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection,

but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefore, the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank." (Section 13, Clause (c).)

Under the plain language of this Act, which is really a codification of the law as settled by prior decisions of the Pennsylvania appellate courts,* Franklin Trust Company was an agent collecting bank, and petitioner is entitled to an immediate return of the proceeds of the checks and drafts.

**Bank of Wesleyville v. E. D. Rose*, 85 Pa. Superior Ct. 52 (1925); cited with approval in *Jacobs v. Mohnton Trust Co.*, 299 Pa. 527, 530 (1930).

In *Bank of Wesleyville v. Rose, supra,* Judge Gawthrop, who delivered the opinion of the court, stated on page 57:

"It is familiar law that 'when a bank credits a customer with the amount of a check, endorsed by him in blank, deposited in his account, the bank does not in the absence of a special agreement from this fact standing alone become a holder of the paper for value; *the title to the check remains in the depositor . . . The relation arising from such a transaction, as between the bank and the depositor, is that the former becomes the agent of the latter for the purpose of collection*': . . . In Hazlett v. Commercial Bank, 132 Pa. 118, 125, Chief

The Supreme Court of Pennsylvania in *Franklin Trust Company of Philadelphia (Claim of C. D. Tuska)*, 319 Pa. 302 (1935), has expressly so interpreted this Act.

In that case claimant on October 1, 1931, deposited a check on bank *A* with Franklin Trust Company. Franklin Trust Company deposited the check for collection with bank *B*. *B* sent it to bank *C*. It cleared through the New York Clearing House and was paid on October 5. Immediately the amount of the check became an unconditional credit to *B* on *C's* books. Actual payment or unconditional credit was not made by *B* to Franklin Trust Company on October 5, and at the close of that day, the Secretary of Banking took possession. The estimated date of collection was October 6, and Franklin Trust Company on two separate occasions advised claimant it would not honor his draft on it until that time. *B* paid the proceeds to the Secretary of Banking. *Held,* claimant was entitled to a preference. Mr. Justice Maxey, who delivered the opinion of the Court, stated, at page 308:

> "Under sections 2 and 4 of that act, the trust company was clearly the agent of the depositor for its collection . . ."
>
> "No matter what the law of this Commonwealth was prior to the Bank Collection Act of 1931 or what the law may be in other jurisdictions, this act is conclusive of this controversy. The trust company was 'an agent collecting bank' within the meaning of section 13 (c) of that act. The stipulation of the parties

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Justice Paxson said: 'The mere fact that the collecting bank credited him (the depositor) with the check as cash did not alter that relation. This is done daily,—indeed, it is almost the universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit.'" (Italics supplied.)

> is, *in the very words of this act,* that the item 'was neither paid nor remitted to claimant in cash or by an unconditional credit given on the books of the Franklin Trust Company or on the books of any other bank prior to the closing of the bank.' It follows that the assets of the collecting agent bank were impressed with a trust in favor of the appellee for the amount of the proceeds and that therefore the appellee is entitled to a prior claim upon such assets." (Italics by the Court.)

Under the Pennslyvania Bank Collection Act and the cited case decided by the highest Court of Pennsylvania, petitioner is unquestionably entitled to the sum of $8,747.66, proceeds of checks and drafts delivered to Franklin Trust Company for collection and uncollected until after it closed. It is submitted that the Circuit Court of Appeals was in error in holding, contrary to the cited act and decision, that petitioner is not entitled to said $8,747.66.

(b) Upon insolvency, Franklin Trust Company lost its right to receive the funds in the correspondent banks, and petitioner became entitled to immediate possession thereof.

(Specifications of Error Nos. 7, 8, 12, 13.)

Prior to the close of the business day on October 5, 1931, Franklin Trust Company had not received any notice and, consequently, had not made any notation on its books that the $32,403.26 in cash, checks and drafts then in the possession of the correspondent banks had been received by said banks. Such notices were not received until after respondents had taken possession and control of the property and assets of Franklin Trust Company. The cash and the proceeds of the drafts and checks making up the $32,403.26,

are now held in escrow under a stipulation entered into pursuant to the opinion of the District Court of November 12, 1931. Up until the time they were placed in escrow they remained in the hands of the correspondent banks. None of the $32,403.26 ever came into the possession of Franklin Trust Company and, therefore, petitioner is the owner of that fund.

In *Commercial Bank of Pennsylvania v. Armstrong,* 148 U. S. 50, 37 L. ed. 363, 15 S. Ct. 533 (1893), the Commercial Bank of Pennsylvania sent paper for collection and credit to the Fidelity Bank in Cleveland, the balance to be remitted tri-monthly. The Fidelity Bank agreed to "collect at par all points west of Pennsylvania and remit on the first, eleventh and twenty-first of each month" in consideration of the temporary use of the funds. Prior to its failure, the Fidelity Bank had sent some of the paper to sub-agents for collection, and they had collected it and unconditionally credited the Fidelity Bank with the amounts collected before it had become insolvent. This Court held that the funds in the sub-agent banks were the property of, and belonged to, the Commercial Bank of Pennsylvania.

Mr. Justice Brewer, who delivered the opinion of this Court, stated, at pages 56, 57, 58:

> "That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. . . . If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand,

> such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected. Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same . . . No mere bookkeeping between the Fidelity and its subagent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction."

It is submitted that this decision governs the present case in so far as the cash and proceeds of checks and drafts which were in the possession of the correspondent banks at the close of the business day on October 5, 1931, and the Circuit Court of Appeals was in error in not holding that petitioner is the owner of the $32,403.26.

(c) Acceptance by Franklin Trust Company from petitioner's distributors of $40,842.51 in cash, and checks and drafts which were later collected, under an express agreement to deliver cash to petitioner's depository in New York City created an express trust in petitioner's favor.

(Specifications of Error Nos. 9, 10, 11, 12, 13.)

Despite the fact that some of the averments of petitioner's bill are "qualified" by the answer, it is obvious that the facts in this case are not in dispute. The bill and answer clearly establish, with regard to the cash and pro-

ceeds of collected checks and drafts which were delivered directly to Franklin Trust Company, the essential fact that petitioner and Franklin Trust Company agreed this money was to be delivered, *in cash*, to petitioner, or its depository, in New York City by noon of each Monday and Wednesday. Cash was insisted on by petitioner and Franklin Trust Company expressly agreed to deliver cash only. No check, draft or credit advice of Franklin Trust Company, or any other bank, would meet the terms of the agreement. Not even a cashier's check of Franklin Trust Company's New York City correspondent bank (First National Bank of New York) was acceptable to petitioner. And the cash had to be in petitioner's New York City depository each Monday and Wednesday in time for petitioner to draw upon it that afternoon.

Respondents, in the answer to the bill, aver that, "*under the terms and conditions of the agreement*", Franklin Trust Company had the right to *use* all sums of money received by it. This is a statement of respondents' interpretation of Franklin Trust Company's legal rights under the agreement, i. e., a conclusion of law. It is not, and was not intended to be, an averment of fact. But this conclusion of law is incorrect. On the contrary, the facts as established by the pleadings absolutely preclude any inference that the parties understood that Franklin Trust Company was to have the right to use the cash and the proceeds of the checks and drafts delivered to it.

Clause (e) of the agreement of August, 1930, expressly provided under what terms and conditions Franklin Trust Company would be allowed to *use* the cash entrusted to it by petitioner for delivery to its depository in New York City, namely, when special permission was granted to use a specific sum for a definite length of time. Under the doc-

trine "*inclusio unius est exclusio alterius,*" this is strong evidence that neither petitioner nor Franklin Trust Company considered that Franklin Trust Company had the right to *use* this cash fund at any other time.

Other facts impel the same conclusion. In the first place, the agreement originally provided for the payment of 2 per cent. interest on the "Disbursement" or checking account. The account in which it *was* understood Franklin Trust Company was entitled to use the money. By the terms of the agreement, an average of $25,000 had to be maintained in this account. Actually the average balance in this account was always far in excess of this minimum. It is inconceivable that business men of the acumen to require 2 per cent. interest on a checking account would forego interest on money on deposit in another account with the same bank, if they intended the bank to have the same right to use the funds therein. The fact that Franklin Trust Company was not required to pay interest on the "Deposit" account is highly persuasive that it had no right to use the money therein.

In the second place, no provision of the agreement between the parties even suggests that Franklin Trust Company had the right to use these funds except when the parties expressly so agreed. On the contrary, Franklin Trust Company expressly agreed to accept *cash* from petitioner's agents and to forward and deliver *cash* every Monday and Wednesday to petitioner in New York. This negatives any thought of right to use the funds.

In the third place, the parties expressly agreed that when they would enter into separate agreements providing that Franklin Trust Company could use certain sums in its general banking business, for stated periods of time, said sums were to be called by check instead of being forwarded

by Franklin Trust Company to petitioner in New York City, whereas the cash, held by Franklin Trust Company to be forwarded and delivered to petitioner in New York City, was never subject to check. This provision could only have been made because both parties considered the cash held by Franklin Trust Company for the purpose of delivery to petitioner in New York City, as trust property, set apart and not subject to the usual incidents of a general deposit. Of course when the parties, by mutual agreements, divested Franklin Trust Company from its trust obligation as to certain sums, those sums then and there took on all of the incidents of a general deposit, and thereafter were so treated by both parties. However, no agreement, permitting Franklin Trust Company to use petitioner's cash, was in effect on Monday, October 5, 1931.

In the fourth place, petitioner was not required to maintain an average balance in the so-called "Deposit Account." If Franklin Trust Company had contemplated the right to use the funds in this account, would it not have demanded an average balance similar to that required in the "Disbursement Account"?

It is plain that Franklin Trust Company received ample consideration for its contract without having the right to use the funds in the "Deposit Account." Petitioner's object in agreeing to maintain an average balance of $25,000.00 in the checking account was, not to receive the 2 per cent. interest thereon, but to afford consideration to Franklin Trust Company for its undertaking to transfer and deliver the cash accepted by it from petitioner's distributors to petitioner's depository in New York City. Petitioner's action in August, 1930, places this fact beyond doubt.

Interest on money loaned by banks from 1925 to September, 1929, was at the rate of 6 per cent. During those

years, in compliance with the agreement of the parties, petitioner maintained an average balance in excess of $25,000.00 in the "Disbursement Account," upon which Franklin Trust Company paid interest at the rate of 2 per cent. Franklin Trust Company, therefore, derived a considerable profit on this account. This same profit, or at least a materially larger rate than 2 per cent., could have been obtained by petitioner in a secured risk. In addition, petitioner entered special agreements with Franklin Trust Company permitting it to use $450,000.00 for two months in 1927, $440,000.00 for two months in 1928, and $100,000.00 for one month later in 1928. No interest was paid by Franklin Trust Company for the use of these sums. Interest on call money received by Franklin Trust Company on these sums materially increased its remuneration for the work done in connection with the forwarding of the cash accepted from petitioner's distributors to petitioner's New York depository.

It is common knowledge that by August of 1930, interest rates on money had declined. Franklin Trust Company consequently began receiving less profit on the checking account. This prompted a request by it to be permitted to discontinue the payment of the 2 per cent. interest thereon. As stated *supra,* petitioner's main object in maintaining the disbursement account was to afford Franklin Trust Company consideration for *all* its services. Consequently, petitioner agreed to eliminate interest on the checking account. It requested Franklin Trust Company, however, to go to the trouble and additional expense of transferring and delivering the cash twice a week instead of once. This request was granted.

Manifestly Franklin Trust Company received adequate consideration for all its services without the right to use the funds in the "Deposit Account."

Under these circumstances it is clear that a fiduciary relationship existed between plaintiff and Franklin Trust Company with respect to the $40,842.51 under four different principles of law, namely: (1) acceptance of money from one person for delivery to another constitutes the taker a trustee; (2) acceptance by a bank of a deposit for a particular purpose makes the bank a trustee; (3) acceptance by a bank from a customer of a deposit for the purpose of purchasing cash for the customer in another city constitutes the bank a trustee; and (4) equity regards as done that which ought to have been done.

These principles will be discussed in the order stated.

1. Acceptance of Money From One Person for Delivery to Another Constitutes the Taker a Trustee for the Latter.

Franklin Trust Company expressly agreed to accept the cash sum of $40,842.51 for transfer and delivery in cash to petitioner's depository in New York City. It failed to apply the cash to the purpose for which it was accepted. This money has been traced into a specific fund, namely, the cash fund of Franklin Trust Company, which was augmented thereby, and at all times has been, and now is, in excess of the total amount of petitioner's claims. Consequently, when respondents took over this specific fund, it included $40,642.67 of petitioner's cash.

That this constituted Franklin Trust Company a trustee is made manifest by the rule enunciated by this Court in the case of *McKee v. Lamon*, 159 U. S. 317, 322 (1895), in the following words:

"There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor [citing cases]."

And in *City of Miami v. First Nat. Bank of St. Petersburg, Fla., et al.*, 58 F. (2d) 561 (C. C. A. 5th, 1932), where two banks were involved, the Court, speaking per Judge Hutcheson, stated at page 562:

"The St. Petersburg bank, then, in receiving and collecting the item, was the agent of the City of Miami, and, unless the facts show, or the law implies, an agreement that after collection it ceased to be agent of, and became debtor to, the city, it held the $5,000 collected for it, impressed with a trust which it could not discharge except by delivering the money to its principal; for, simply stated, '*every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of trust.*' [Citing cases.]" (Italics supplied.)

It may be argued that, in the absence of an express agreement to the contrary, it is a custom of banks to use in their general banking business all deposited funds regardless of the purpose for which the same was accepted. At the outset it should be borne in mind that no such custom was pleaded. This was fatal, and respondents are precluded from presently raising this question.

Dakin v. Bayly, 290 U. S. 143, 78 L. ed. 229, 54 S. Ct. 113 (1933);

Cameron v. Carnegie Trust Co., 292 Pa. 114 (1928).

In *Dakin v. Bayly*, the Court, speaking per Mr. Justice Roberts, at pages 147, 148, stated:

> "As was said in the Malloy Case, the effect of the statute might be avoided by agreement or by clear and certain custom known to the depositor, *but no such agreement or custom was pleaded by the defendant.*"
>
> " . . . Nor is any custom pleaded whereby the Clearwater bank was to become the debtor of the depositors of the checks upon receipt of something other than cash or equivalent from the subagent . . . ." (Italics supplied.)

In *Cameron v. Carnegie Trust Co., supra*, the Court, speaking per Mr. Justice Simpson, stated, at pages 119 and 120:

> "*The present record is silent regarding any such alleged custom, and no authority has been shown us which so asserts,* where, as here, the collecting agency was insolvent when the check, note or draft was received and collected. If such a custom exists, it is, as respects the present status, a bad one, and the courts will not enforce it (Holmes v. Johnson, 42 Pa. 159; Dempsey v. Dobson, 184 Pa. 588), since it would enable a banking institution to successfully commit a fraud . . . ." (Italics supplied.)

Furthermore, there is no such custom as between a bank and an individual. And even if there were, it would not supplant the rule of law that the acceptance of money from one person for delivery to another constitutes the taker a trustee. This was decided by this Court in *Federal Reserve Bank of Richmond v. Malloy, et al., trading as Malloy Brothers*, 264 U. S. 160, 170, 171 (1924), where it stated:

> "It is said, however, that there is a custom among banks to settle among themselves by means of drafts so well established and notorious, that judicial notice of it may be taken. But the usage here invoked is not that, but is one of special application to a case where the collection of a check is intrusted to the very bank upon which the check is drawn and where payment is accepted in a medium which the contract, read in the light of the law, forbids. The special situation with which we are dealing is controlled by a definite rule of law which it is sought to upset by a custom to the contrary effect. It is not now necessary to consider the effect of a custom which contravenes a settled rule of law or the limits within which such a custom can be upheld. See Barnard v. Kellogg, 10 Wall. 383, 390-394. Decisions upon that question are in great confusion. But whatever may be the doctrine in other respects, certainly a custom relied upon to take the place of a settled principle of law, and therefore to have the force of law, ought to be as definite and specific in negativing the principle as the law which it assumes to supplant is in affirming it."

In *Pottorff v. Key*, 67 F. (2d) 833, (C. C. A. 5th, 1933), the Court, in holding that a trust existed in a fund accepted from a customer by a bank, stated (page 833):

> "It was shown that the banks in El Paso habitually used money thus deposited 'in escrow,' putting in its place as a memorandum a cashier's check or a certificate of deposit; but there is no evidence that Key [claimant] knew of, or assented to, any such thing. The bank's agreement with him was express that it would hold—not borrow or use—the money, and would in the contingency which happened return it to him."

It is unquestioned that Franklin Trust Company accepted the cash sum of $40,842.51 under express agree-

ment with, and notice from, petitioner to deliver it to petitioner's depository in New York City on Monday, October 5, 1931. Franklin Trust Company had no right to use this money. It is submitted, therefore, that, under the above cases, Franklin Trust Company was a trustee of this money that it received from one person for delivery to another.

2. Acceptance by a Bank of Deposits for a Specific, Designated or Particular Purpose Constitutes the Bank a Trustee Thereof Until the Purpose Is Accomplished.

The cash sum of $40,842.51 was accepted for a specific, definitely-designated purpose, namely, the delivery of that amount of cash to petitioner's depository in New York City. That the acceptance of the cash under such terms constituted Franklin Trust Company a trustee is well established.

Libby v. Hopkins, 104 U. S. 303 (1881);

Massey et al. v. Fisher, 62 Fed. 958 (C. C., E. D. Pa. 1894);

Keyes v. Paducah & I. R. Co., 61 F. (2d) 611 (C. C. A., 6th, 1932);

Pottorff v. Key, supra (67 F. (2d) 833);

Smith v. Mottley, 150 Fed. 266 (C. C. A., 6th, 1906);

Parker State Bank v. Pennington, 9 F. (2d) 966 (C. C. A., 8th, 1925);

Merchants' Nat. Bank of Helena, Mont., et al., v. School Dist. No. 8, of Meagher County, Mont., 94 Fed. 705 (C. C. A., 9th, 1899);

Montagu et al. v. Pacific Bank et al., 81 Fed. 602 (C. C., N. D. Cal., 1897);

Salzburger Bank v. Standard Oil Company, 173 Ga. 722 (1931);

Weitzel v. Traders' National Bank, 18 Pa. Superior Ct. 615 (1901);

Bank of the United States v. Macalester, 9 Pa. 475 (1848);

Vosburg's Estate, 279 Pa. 329 (1924);

Commonwealth, ex rel. v. Tradesmen's Trust Company, 61 Pa. Superior Ct. 137 (1915);

Commonwealth v. Tradesmen's Trust Company (No. 1), 250 Pa. 372 (1915);

Commonwealth, ex rel. v. Tradesmen's Trust Company (No. 2), 250 Pa. 378 (1915);

Commonwealth, ex rel. v. Tradesmen's Trust Company (No. 3), 250 Pa. 383 (1915);

Girard Avenue Title and Trust Company Case, 317 Pa. 313 (1935);

Peoples-Ticonic Nat. Bank et al. v. Stewart, 86 F. (2d) 359 (C. C. A., 1st, 1936);

I Patton, Digest of Banking Law, § 1789;

I Perry, Trusts and Trustees (7th ed.) § 122;

7 C. J. p. 631, § 307.

In *Libby v. Hopkins, supra*, (104 U. S. 303), Stewart and Company were bankers and merchants. Hopkins maintained a cash account and a merchandising account with them. His remittances were credited in his cash account. He paid for merchandise by draft. He borrowed $100,000.00 from Stewart and Company, giving his demand note, secured by several mortgages. He made payment of $25,000.00, $10,000.00, $17,000.00, $10,000.00 and $48,025.00, at various times, with instructions that same be applied upon payment of his note. The first three payments were so applied; the last two were not. Thereafter Hopkins failed, owing Stewart and Company $231,515.00, on account and

unsecured. Stewart and Company endeavored to foreclose the mortgages, claiming the full principal of the note, less the first three payments. The Court held that Hopkins was entitled to credit for the last two payments as well. Mr. Justice Woods, in his opinion in that case, stated, at page 308:

> " . . . And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, *with express directions to apply them on a specific debt*. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.
>
> "Whether or not he had the right to direct the application, is immaterial. There was no legal obstacle to the application as directed. *The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.*
>
> *"They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.*
>
> "Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. . . .
>
> "But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. *When A. sends money to B., with*

directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting. . . .

". . . *The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees.*" (Italics ours.)

In the instant case, as in the cited case, a bank was involved; the customer had two accounts with the bank; the bank accepted money and drafts with express directions to apply them to a designated purpose; the customer never gave consent to the bank to become the customer's debtor; there was no legal obstacle to the application of the cash as agreed upon by the customer and the bank; the directions imposed on the bank "the obligation to apply the money as directed, or to return it to" petitioner; the bank "had no better right to refuse to make the application and to retain the money" and misapply it "than if . . . [the bank] had been directed to pay money on a debt due from . . . [petitioner] to another of . . . [petitioner's] creditors, or than . . . [the bank] had to apply to the payment of . . . [petitioner's] debt to . . . [the bank] money which . . . [petitioner] left with . . . [the bank] as *a special deposit;*" the bank "held . . . [petitioner's] money in trust to apply it as directed by . . . [petitioner];" the bank "refused to make the application as . . . [petitioner] directed; and the bank held it, therefore, subject to . . . [petitioner's] order."

It is submitted that *Libby v. Hopkins* rules the instant case, and conclusively shows that Franklin Trust Company was a trustee as to said cash sum of $40,642.67.

In the case of *Massey et al. v. Fisher, supra* (62 Fed. 958), where an indorser paid a note to a bank, and took a receipt containing an order for a surrender of the note on return of the receipt, the Circuit Court for the Eastern District of Pennsylvania held that the relation between the bank and the indorser was not that of debtor and creditor, but was a fiduciary relation, entitling the indorser, on the bank's becoming insolvent without applying the money on the note, or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof.

In *Keyes v. Paducah & I. R. Co.*, *supra* (61 F. (2d) 611), the Court, speaking per Judge Simons, stated at page 613:

> "Trusts have been impressed upon funds which are not strictly special deposits, and where there is no intention expressed or clearly to be implied that the funds deposited should be segregated and not commingled with the general funds of the bank. . . . *Another ground for such declaration of trust is the receipt of funds to be applied and used for a definitely designated purpose, but which are in fact fraudulently or unlawfully appropriated to other uses. This misapplication constitutes a wrongful act, and makes the recipient a trustee.*" (Italics supplied.)

In *Pottorff v. Key, supra* (67 F. (2d) 833), the claimant, Key, in connection with the purchase of certain real estate, delivered his check in the amount of $500.00 to the bank "'in escrow,' to be forfeited to the vendor as damages if the title proved good and Key failed to purchase; or to be applied as purchase money if Key kept the contract; or to be returned to Key if the title proved bad." The bank collected the check, accepting the cashier's check of the drawee bank therefor, which was used by the bank in its business. Several weeks later the bank failed and Key became entitled to

the return of his $500.00. Held, that the bank held the $500.00 in trust for the claimant, but preference was disallowed because of inability to trace the fund. The Court, speaking per Sibley, Circuit Judge, stated at page 833:

> "We agree that *the $500 was not a general deposit or a loan to the bank, but was a special deposit, in law a bailment and in equity a trust*. . . . The ownership of the cashier's check which represented the $500 was in Key or his vendor and not in the bank." (Italics supplied.)

In *Smith v. Motiley, supra* (150 Fed. 266), the claimant gave a check to a bank for the purpose of paying a note which the bank claimed to have authority to collect. The bank accepted and collected the check and placed the proceeds to the credit of the payee, but failed to obtain the surrender of the note. The bank subsequently was declared bankrupt. Held, that claimant was entitled to recover the proceeds of the check.

In *Parker State Bank v. Pennington, supra* (9 F. (2d) 966), Mr. Justice Munger, who delivered the opinion of the Court, said, at page 969:

> ". . . payments were to be held by the bank until a deed had been delivered to the plaintiff and an abstract furnished him showing a merchantable title. . . . *The allegations in the complaint, with the allegations that the deed and title contracted for had not been furnished, charged the Parker State Bank with a contractual obligation to return to the plaintiff the money which had been deposited for a special purpose and constituted the bank a trustee of an express trust for the benefit of the plaintiff*. Libby v. Hopkins, 104 U. S. 303, 308 [and other cases].

"'*Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee,* and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust.'" (Italics supplied.)

In *Merchants' Nat. Bank of Helena, Mont., et al, v. School Dist. No. 8, of Meagher County, Mont., supra* (94 Fed. 705), the School District deposited money for the purpose of redeeming matured bonds. The receiver for the bank took possession of a cash sum in excess of the amount deposited. In allowing the claimant a preference, the Court, speaking per Circuit Judge Gilbert, said, at page 707:

"The bank undertook to receive the money as a trust fund for an express purpose, and for no other . . . The money was to be treated as the funds of the School District, and not as the funds of the bank, and, in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds."

In *Montagu et al. v. Pacific Bank et al., supra* (81 Fed. 602), money was deposited in one bank for the account of another, with directions to pay the amount thereof by telegraph to a third bank. The bank, to whose credit the money was deposited, received it, but suspended business before making payment as directed. Held, that this was a deposit for a particular purpose, recoverable in full. Morrow, Circuit Judge, said at page 608:

". . . it is plain that *the deposit in this case should be treated as a special deposit made for a particular purpose,* and not as a general deposit. It was therefore in the nature of a bailment, the complainants never having parted with their title to the money. *Consequently a trust was impressed upon this $5000 in favor of complainants,* and it does not belong to the general creditors of the bank." (Italics supplied.)

In *Salzburger Bank v. Standard Oil Company, supra* (173 Ga. 722), an agent of the Standard Oil Company deposited funds belonging to that company with the Salzburger Bank at Pineoria for the purpose of having them remitted to the district office of the company at Savannah. Before the funds had actually been transmitted the Salzburger Bank closed. The court, in awarding the fund to the Standard Oil Company, stated at page 726:

> *"If an agent places money in the hands of a bank to be delivered to his principal, a trust arises in favor of the latter. The acceptance of the money with notice of its ultimate destination creates a duty on the part of the bank to devote it to the purpose intended,* and a court of equity will enforce the trust. McKee v. Lamon, 159 U. S. 317, 322 (16 Sup. Ct. 11, 40 L. ed. 165); Re Interborough Con. Corp., 288 Fed. 334 (32 A. L. R. 932). *One who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee. . . . In receiving a deposit made for the purpose of having it applied to a particular purpose, the bank acts as agent of the depositor; and when the bank fails to apply it at all, or misapplies it, it can be recovered as a trust deposit."* (*Italics supplied.*)

In *Weitzel v. Traders' National Bank, supra* (18 Pa. Superior Ct. 615), where a son deposited money in his father's bank account for the purpose of having it applied to the payment of his outstanding note, payable at the bank, and the teller accepted the deposit and agreed to its application, but before the note was presented, a year afterwards, when long overdue, the father withdrew the son's money, with the permission of the bank, the court held the bank liable to the son for the amount deposited.

The Court, per Porter, *J.*, stated at page 620:

"We are of opinion that it was the duty of the bank to hold the money and apply it to the payment of the plaintiff's note, *for which purpose alone it was deposited, and that having failed to do so, the bank is liable to the plaintiff for the damages resulting to the plaintiff therefrom.*" (Italics supplied.)

The Supreme Court of Pennsylvania in *Bank of the United States v. Macalester, supra* (9 Pa. 475), held that where funds were deposited in a bank for a special purpose, the Receiver could not refuse to apply them to the object for which they were deposited on the ground that a debt was due the bank by the depositor, stating at page 482:

"It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use."

In *Vosburgh's Estate, supra* (279 Pa. 329), renewal notes were sent by the maker to the payee to be discounted and the proceeds used to lift the old notes. Between the day of discount and time for payment, the payee died, the moneys in question having been placed in his own account. In holding for the claimant, the court, through Mr. Justice Kephart, said at page 332:

". . . Every deposit is a trust, except possibly general bank deposits; *every person who receives money to be paid to another or to be applied to a particular purpose is a trustee,* if so applied as well as when not so applied." (Italics supplied.)

In *Commonwealth, ex rel. v. Tradesmen's Trust Company, supra* (61 Pa. Superior Ct. 137), real estate settlement money was delivered to the Trust Company to be delivered to the vendor on settlement. The Trust Company delivered its own check, drawn on itself, to the seller, but before the check was presented, the Trust Company failed.

In *Commonwealth v. Tradesmen's Trust Co.*, (No. 1), *supra* (250 Pa. 372), the Trust Company had a contract with a builder by which it sold certain securities belonging to the builder under an agreement that the funds so received therefrom should be subject to the check of the builder and should be used in a building operation. The Trust Company wrongfully mingled the funds so received with its own funds and failed.

In *Commonwealth, ex rel. v. Tradesmen's Trust Company* (No. 2), *supra* (250 Pa. 378), the plaintiff made an assignment to the Trust Company for the benefit of creditors. The Trust Company turned the assets into cash and mingled the cash with its general funds.

In *Commonwealth, ex rel. v. Tradesmen's Trust Company* (No. 3), *supra* (250 Pa. 383), the Trust Company mingled with its general funds, money delivered to it for the purpose of purchasing certain bonds.

In each of the above cases (Tradesmen's Trust Company) the Court held that *there was a trust created in the fund in question.* Recovery was denied, however, because (unlike the instant case) the money was not traced into a specific fund.

In *Girard Avenue Title and Trust Company Case, supra* (317 Pa. 313), a bank accepted the note of a depositor with the understanding that the proceeds would be credited to his deposit account. The bank mingled the note with its general assets and gave no credit to the depositor for the proceeds. It was held that the action of the bank constituted a conversion of the proceeds of the note, thus giving rise to a trusteeship *ex maleficio* thereof. It was further held that the bank could not set off its claim on the note against the fund held in trust for the depositor and

that, upon the insolvency of the bank, the depositor was entitled to a preference with regard to the traceable proceeds of the note.

In *Peoples-Ticonic Nat. Bank et al. v. Stewart, supra* (86 F. (2d) 359), a bank, as the executor of a mortgagee's estate, refused to accept a certified check tendered in payment of the mortgage debt in the absence of its attorney. Thereupon the check was deposited in the mortgagor's account with the bank with the understanding that it was to be applied in discharge of the mortgage. The bank was closed before it delivered a deed in discharge of the mortgage. It was held that the mortgagor could compel the receiver of the bank to apply the proceeds of the certified check in discharge of the mortgage and the bank as executor to discharge the mortgage because there was a trust in said funds in favor of the mortgagor.

In the case now before the Court petitioner and Franklin Trust Company specifically and definitely agreed, *prior* to the acceptance of the cash sum of $40,842.51 by the bank, that the sole purpose of delivering the cash to Franklin Trust Company was to have it transferred and delivered to petitioner's depository in New York City on Monday, October 5, 1931. The cash in question was handed to Franklin Trust Company under and subject to that agreement. Petitioner fulfilled every item of its contract. Nothing remained to be said or done on its part. The only thing which remained undone was the application of the cash by Franklin Trust Company in accordance with the given and accepted directions. It is submitted that failure so to apply the cash constituted it a trustee thereof.

3. The Acceptance by a Bank From a Customer of a Deposit for the Purpose of Purchasing Cash for the Customer in Another City Constitutes the Bank a Trustee.

Franklin Trust Company, by the terms of its agreement with petitioner, was required to deliver *cash* to petitioner's depository in New York City every Monday and Wednesday of each week. Whether it be said that Franklin Trust Company accepted from petitioner's agents in Philadelphia the cash for delivery to petitioner in New York, or accepted it as a deposit for forwarding to petitioner in New York, or that petitioner bargained for or purchased cash in New York, the inescapable conclusion is the same: i. e., a fiduciary relationship existed between petitioner and Franklin Trust Company. Petitioner did not bargain for the credit of Franklin Trust Company. It bargained for and purchased cash in New York City. It has never received that which it bargained for and purchased.

In the case of *In Re A. Bolognesi & Co.*, 254 Fed. 770 (C. C. A., 2nd, 1918), a banker received deposits from certain individuals for the purpose of purchasing drafts for presentation in Italy. The banker had purchased and delivered some of the drafts to one class of claimants, but payment upon the drafts was refused when they were presented. The banker had not bought the drafts for the other class at the time he failed. The District Court held that both classes of claimants were entitled to an equal share of the distribution. The Circuit Court of Appeals reversed this, holding that the claimants who had not received the drafts were preferred over the others on the theory that the bankrupt had not carried out his trust as to them, because he took their money but failed to purchase and deliver

the drafts to them. The Court, speaking per Hough, Circuit Judge, stated at page 772:

> "In so far as any claimant gave money to the bankrupt for investment in a specified manner, the bankrupt undoubtedly, by accepting the deposit, undertook to act in the interest of the depositor claimant, and thereby assumed toward him a fiduciary relation (Johnson v. Brooks, 93 N. Y. at page 342) . . .
>
> "But *those claimants who came to the bankrupt to buy drafts and the like, and got what they bargained for, cannot claim against the fund, for their bargains were completed;* they got what they asked for, and, in the absence of any circumstances of active fraud or deception, the fact that the commercial paper issued to them remains unpaid does not change their status as general creditors." (Italics supplied.)

In the case of *In Re Jarmulowsky et al.*, 258 Fed. 231 (C. C. A., 2nd, 1919), bankers received from the petitioner $288.00 for the purpose of forwarding an equivalent sum to a person in Europe. The bankers failed prior to the forwarding of the sum. The Court, following *In Re Bolognesi & Co., supra,* held that the petitioner was entitled to recover the money on the theory that a trust was created and was not carried out. The Court stated at page 232:

> "That the Jarmulowskys in receiving this money acted in a fiduciary capacity, and that the person intrusting such money to them may on tracing the same into the possession of the trustee in bankruptcy recover it in solido, is sufficiently shown by our recent decision in Re Bolognesi, 254 Fed. 770, — C. C. A. —."

In the case of *In Re Gubelman et al.*, 9 F. (2d) 486 (C. C. A., 2nd, 1925), the Court again applied the doctrine of

In Re Bolognesi & Co., supra. In that case claimant went to his bankers, stating that he wished the possession of $9,000.00 in United States currency when he arrived in Germany, and asked them to arrange for this. The bankers wrote a letter to a Leipzig house, requesting it to open a credit for $9,000.00 in favor of the claimant. They furnished a copy of this letter to claimant. Prior to the presentation of the letter by the claimant, the bankers failed. The Court refused the claimant a preference upon the ground that he had received what he contracted for, namely, a letter of credit on the Leipzig house, and, therefore, the bankers had carried out their trust agreement; also, that it had not been shown that the fund proceeded against had contained the claimant's money.

The Court, speaking per Judge Hough, stated at pages 486 and 487:

> "We have held, quite plainly as it seems to us, that if A. intrusts to B. moneys for investment in a particular manner, but B. does not carry out his undertaking and becomes bankrupt, A. may recover his money out of any fund belonging to B.'s estate into which A.'s money can be traced. The reason for this ruling is that B., by undertaking, as stated, assumed a fiduciary relation to A., and by neglecting to invest as agreed was guilty of a breach of trust. In Re Bolognesi, 254 F. 77, 166 C. C. A. 216; In Re Jarmulowsky, 258 F. 231, 169 C. C. A. 297; In Re Shapiro (C. C. A.) 298 F. 1021.
>
> . . . . .
>
> "Therefore the question at bar is primarily one of fact; for if Jasper got a draft, check, or its equivalent, and in so getting received exactly what he asked for and something he thought appropriate for his purpose, he cannot be heard to complain that the bankrupt

was his trustee and committed a breach of trust. This question of fact must be answered in the light of *all* the circumstances."

In the case at bar petitioner asked for and was promised cash delivered to its depository in New York City. Petitioner did not receive this. Therefore, petitioner did not receive "exactly what" it "asked for", and Franklin Trust Company failed before it carried out its obligation. It is submitted that the $40,842.51 thereby became impressed with a trust in petitioner's favor.

4. Under the Maxim, Equity Regards as Done That Which Ought to Have Been Done, There Was an Equitable Assignment of the Cash to Petitioner.

Franklin Trust Company agreed to deliver the sum of $40,842.51 in cash to petitioner's depository in New York City on Monday, October 5, 1931. On that day Franklin Trust Company was open for business and had the cash sum in its possession but, in violation of its agreement, it failed to transfer and deliver it to petitioner's depository. Upon the doctrine of equitable assignment, petitioner is, therefore, now entitled to that cash fund.

Early & Daniel Co. v. Pearson, 36 F. (2d) 732 (C. C. A., 5th, 1929);

Fourth Street Bank (of Philadelphia) v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 S. Ct. 439 (1897).

Early & Daniel Company v. Pearson, supra, involved several claims. In No. 5659, the claimant sent a draft to the Macon Bank for collection. The drawee paid said draft with its check on Bank B, which the Macon Bank deposited

with the Clearing House. Before the Macon Bank was given credit therefor, it failed, and the money was paid to its receiver.

In No. 5737, the Macon Bank made an agreement with thirteen banks that it would arrange with the Federal Reserve Bank to credit all checks of said banks drawn on it to the reserve account of the drawer, and charge the reserve account of the Macon Bank upon receipt of such checks by the Federal Reserve Bank—payment not to be considered final on bad checks. The Macon Bank agreed to maintain on deposit with the Federal Reserve Bank sufficient funds, in addition to its lawful reserve, to cover the checks of said banks, and the Federal Reserve Bank agreed to the plan of immediate credit and debit. This agreement was the sole reason for the thirteen banks carrying balances with the Macon Bank. The banks drew checks amounting to $91,000.00 on the Macon Bank, payable to the Federal Reserve Bank. The Macon Bank closed before these were paid, but at the time, had ample credit in Federal Reserve funds to pay said checks.

The Court, speaking per Judge Bryan, stated at pages 734, 735:

> "A question common to the three cases, and one which in our opinion is decisive of each, is whether the evidence discloses a contract under which there was created an equitable assignment of, or lien upon, funds of the Macon bank in favor of the drawers of the drafts or checks. The doctrine of equitable assignment or liens rests upon the maxim that equity regards as done that which ought to be done, and under it effect will be given to the intention of parties to a contract to make some particular property or fund security for a debt or other obligation. But to make that doctrine applicable

it is necessary that the property or fund be identified or rendered capable of identification. It is not essential, however, that such property or fund be in existence at the time the contract was made; it is sufficient that it be in existence during the time within which the assignment may operate.' 3 Pomeroy's Eq. Jur. (4th Ed.) §§ 1235, 1236, 1237.

"In making specific application of the doctrine of equitable assignment to bank funds, the Supreme Court, in Fourth Street Bank v. Yardley, 165 U. S. 634, 17 S. Ct. 439, 440, 41 L. Ed. 855, said:

'. . . That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court [citing cases]. While an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice.' And it was also held that an equitable assignment applies, not only to cash on deposit, but also to money or drafts in the course of transmission or collection.

"The just cited case has not been modified, as is contended by the receiver, by Equitable Trust Co. v. First National Bank of Trinidad, 275 U. S. 359, 48 S. Ct. 167, 72 L. Ed. 313, which dealt with bank credits as distinguished from bank funds on deposit, nor by any later Supreme Court decision."

Attention is called to the fact that petitioner delivered $40,048.03 in cash to Franklin Trust Company late Saturday afternoon, October 3, 1931. Franklin Trust Company accepted this cash subject to its agreement to deliver it to petitioner's depository in New York on Monday, October 5, 1931, so that the cash would be available to petitioner by noon of the same day. Franklin Trust Company transacted practically no business from the time this cash was accepted by it on Saturday, October 3, 1931, to the hour it opened Monday morning, October 5, 1931, the time when it was to forward the money to New York. It failed to carry out its agreement on Monday morning, presumably because it realized its insolvency. It follows that it must have known its status on Saturday afternoon when it accepted the cash. Petitioner, however, had no knowledge that Franklin Trust Company was insolvent.

Had Franklin Trust Company done what it should have done, petitioner would have received the cash on Monday afternoon. Since Franklin Trust Company failed to do what it agreed to do, equity will treat this as done. This may be accomplished by considering this cash fund equitably assigned to petitioner, thus entitling petitioner to a preference therein.

Franklin Trust Company's disregard of its duty to transfer on Monday morning, October 5, 1931, the cash sum of $40,842.51, which it had received for that purpose, and its failure to apply the cash to the purpose for which it was accepted, should not inure to the benefit of general creditors to the detriment of petitioner. There is no equity in a conclusion upholding such action.

The reasoning last stated is amply sustained by the cases. In *Cameron v. Carnegie Trust Co., supra* (292 Pa. 114), where a check had been sent to a banking institution

for collection and remittance, the Court held that the relation between the sender and the collector was that of principal and agent and that the trust was an express one. The Court said, at page 120:

> "In the present case, admittedly, the money belonging to appellant was wrongfully included in the trust company's general assets, which were at all times sufficiently large to make good the amount due, and the effect of refusing relief would be to give to other distributees a larger sum than they would have received but for the fraud practiced on appellant. In view of this, to rule in appellee's favor would be to make the fraud successful, whereas to refuse so to do could not possibly result in legal harm to anyone. Hence, we again state, what is and always should be fundamental, that no one, however innocent he may be, will be permitted to benefit by the wrongdoing of another, if the result will be to make effective the injury to the person wronged, and it is equitably possible to prevent such a result: Stirk's Est., 232 Pa. 98, 110; O'Connor v. *O'Connor, 291 Pa. 175.*"

It is submitted that Franklin Trust Company had an obligation under its contract with petitioner to deliver the $40,842.51 cash, in cash to petitioner's depository in New York City; that there was, therefore, an equitable assignment of this cash sum to petitioner, and that equity should enforce this obligation and assignment by allowing petitioner a preference.

Conclusion.

It has been shown that petitioner is entitled to have this controversy decided in the Federal Court because the parties are citizens of different states; that it was proper for the District Court to exercise jurisdiction over the controversy because the suit is *in personam* to establish a right and the court is not required to order distribution of any fund in the hands of the State Court; and that no question of comity arises because the respondents are in possession and control of the property and assets of Franklin Trust Company solely by authority of statute and entirely without action, consent or approval on the part of any State Court. The property in question is held in escrow by a third party pending a final decision of the Court as to the ownership thereof. It is submitted, therefore, that the Federal Court should exercise jurisdiction over this controversy and the decree of the Circuit Court of Appeals for the Third Circuit entered on September 11, 1936, as corrected by the decree entered on October 16, 1936, should be reversed.

It has been further shown that under the provisions of the Pennsylvania Bank Collection Act of June 13, 1931 (P. L. 568), as interpreted by the highest court of the Commonwealth of Pennsylvania petitioner is entitled to the proceeds of the drafts and checks in possession of Franklin Trust Company at the time it was taken over by respondents, and collected thereafter; that upon insolvency, Franklin Trust Company lost its right to receive the funds in the correspondent banks and petitioner became entitled thereto; and that petitioner is entitled to a preference in $40,842.51 because funds in that amount became impressed with a trust in petitioner's favor. It is submitted, therefore, that peti-

tioner is entitled to succeed on the merits and the decree of the Circuit Court of Appeals for the Third Circuit entered on September 28, 1934, affirming the decree of the District Court for the Eastern District of Pennsylvania entered on June 14, 1933, should be reversed with directions to enter a decree in petitioner's favor.

Respectfully submitted,

GEORGE E. BEECHWOOD,
JAMES S. BENN, JR.,
MARK E. LEFEVER,
J. HARRY LABRUM,
WILLIAM J. CONLEN,
CONLEN, LABRUM & BEECHWOOD,
Attorneys for Petitioner.

APPENDIX A.

Act of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30 and 35.

Section 21. Power of Secretary to Take Possession.—The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner, and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion, the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary, a

deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined, upon oath or affirmation, regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person.

The secretary may, in like manner, take possession of the business and property of any private or unincorporated bank, otherwise exempt from the supervision of the department, whenever such private or unincorporated bank shall have made an assignment for the benefit of creditors or confessed its insolvency.

Section 22. Certificate of Taking Possession.—When the secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

Such superseded receiver, assignee, or trustee shall forthwith file his account in the court having jurisdiction thereof, and pay over and deliver to the secretary all moneys, securities, assets, and property of such corporation or person in his custody, possession, or control. Said court shall allow credit for expenses and for the disbursements

properly incurred or made prior to the taking possession by the secretary, and shall allow proper compensation to said receiver, assignee, or trustee, and his counsel, which, when determined, shall be paid out of the funds of said corporation or person in the hands of the secretary.

Section 29. Status of Secretary as Receiver.—Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

Section 30. Power of Court to Make and Enforce Orders.—The court having jurisdiction shall have power to make and enforce any and all orders necessary and appropriate to enable the secretary to discharge his duties in connection with the business, property, and affairs of any corporation or person taken into possession by the secretary under the provisions of this act.

Section 35. Actions and Suits.—For the purpose of executing any of the powers and performing any of the

duties hereby conferred and imposed upon him, the secretary may, in the name of the corporation or person, prosecute and defend any and all actions and proceedings at law, in equity, or otherwise, pending at the time when the secretary takes possession of the business and property of such corporation or person.

He may, by bill of discovery or other legal or equitable proceeding, obtain information of, and sue for and recover, any assets, debts, or damages, which such corporation or person might sue for and recover, or which any of the creditors might make available for the payment of their claims.

He may, at any time while he is in possession of the property and business of a corporation, institute and maintain against the directors, trustees, managers, or officers, any action or proceeding which is vested in such corporation or in the stockholders or creditors thereof.

He shall be liable to suit, in his representative capacity, by any person seeking to recover specific property, if such property could have been recovered as against the creditors of the corporation or person levying an execution thereon.

APPENDIX B.

Act of May 5, 1927, P. L. 762, §§ 7, 11 and 12.

Section 21 amended.

Section 7. That section twenty-one of said act is hereby amended to read as follows:

Power to take possession.

Section 21. Power of Secretary to Take Possession.—The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion, the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary, a deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined upon oath or affirmation regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person.

Private bank or estate of private banker.

The secretary may, in like manner, take possession of the business and property of any private or unincorporated bank, *or the estate of any private banker,* otherwise exempt from the supervision of the department, whenever such private or unincorporated bank shall have made an assignment for the benefit of creditors, or [confessed its insolvency] *for any of the causes mentioned hereinbefore in this section.*

Section 29 amended.

Section 11. That section twenty-nine of said act is hereby amended to read as follows:

Secretary as receiver.

Section 29. Status of Secretary as Receiver.—Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the *rights, powers, and duties of such corporation or person and with all the* property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, *whether or not the prop-*

erty of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the secretary has possession.

Representative of creditors.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

May surrender burdensome assets.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

Section 30 amended.

Section 12. That section thirty of said act is hereby amended to read as follows:

Power of court to make and enforce orders.

Section 30. Power of Court to Make and Enforce Orders.—The court having jurisdiction shall have power to make and enforce any and all orders necessary and appropriate to enable the secretary to discharge his duties in connection with the business, property, and affairs of any corporation or person taken into possession by the secretary under the provisions of this act, *upon petition of the secretary, acting personally or through his duly authorized*

deputy, setting forth the facts; and the court shall also have the power, upon petition of the secretary, acting personally or through his duly authorized deputy, to order and direct other corporations or persons in possession of assets or property, belonging to the corporation or person in possession of the secretary, to transfer or convey said property or assets to the secretary, and to execute and deliver any and all necessary instruments in writing to accomplish that purpose.

APPENDIX C.

Act of May 15, 1933, P. L. 565, §§ 504, 701 and 713.

Section 504. Taking of Possession by Department.—A. The department may take possession of the business and property of any institution subject to its supervision whenever it shall appear to it that such institution—

(1) Is violating its articles of incorporation, any order of the court issued upon application of the department, or any law of the Commonwealth regulating its business; or

(2) Is conducting its business in an unsafe manner; or

(3) Is in an unsafe or unsound condition to transact its business; or

(4) In the case of a corporation, has an impairment of its capital below the minimum required by law or by its articles of incorporation; and in the case of a person, has not made good a depreciation in the value of the bonds or securities deposited with the department below the minimum required by law; or

(5) Has suspended payment of its obligations, without authority of law, and in the case of a building and loan association, has not, for a period of one year after due demand or notice by a shareholder, paid any matured share or any withdrawal; or

(6) Has refused to submit its records and affairs to, or its officers or directors have refused to be examined upon oath or affirmation concerning its affairs by, the secretary, or any other duly authorized examiner, in connection with any lawful examination or investigation; or

(7) Requests the department, by its board of directors or its board of trustees in the case of a corporation, and, in the case of a person, by its individual owner or owners, to take possession for the benefit of depositors, other creditors, and shareholders.

B. Before taking possession, the department shall conduct a hearing before the department and the Department of Justice, which may be attended only by, and notice of which shall be given only to, the officers and directors of the corporation, or the officers and individual owner or owners of the person. After such hearing, the department may, if it first procures the consent of the Department of Justice, take possession:

Provided, however, That whenever immediate action shall be necessary in order to protect the interests of the depositors, other creditors, or shareholders of an institution, it may take possession without conducting a hearing and without the approval of the Department of Justice.

C. In addition, whenever the secretary in his official capacity is appointed receiver by any court of equity, as provided by law, the department shall take possession of the business and property, and the secretary shall act as receiver, of the institution in the same way and with the same rights and limitations as when the department takes possession in the customary manner provided by this act.

Section 701. Status of Secretary as Receiver.—Except as otherwise provided in this act, the secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession of all property to which the institution has title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether

such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any power granted to or any duty imposed upon him as receiver of such institution.

The secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another.

Section 713. Actions and Suits by and against Secretary.—A. For the purpose of executing any of the powers and performing any of the duties respectively conferred or imposed upon him, as receiver, by this act, the secretary may, in his name as receiver of such institution, prosecute any action at law or in equity in any court of this Commonwealth or of any other state, whether or not such action is pending on behalf of the institution at the time he takes possession. He may likewise similarly defend any action at law or in equity pending against the institution at the time he takes possession.

The secretary may, in his name as receiver of a corporation, institute and maintain against any officer, director, trustee, manager, or other employe of such corporation, any action at law or in equity which such corporation, or any shareholder or creditor thereof, could have instituted or maintained; and he may likewise, in the case of a person of which he is receiver, maintain any similar action against the individuals owning the business or against any employe thereof, which a depositor or other creditor of the person could have instituted or maintained.

B. All claims against the institution, suit upon which has not been commenced prior to the time the secretary took possession, shall be presented in the regular manner provided by this act for the presentation of claims. Neither a depositor or other creditor of the institution, nor any other claimant, may maintain any action at law or in equity upon such claim, except by regular method provided by this act for exceptions to the accounting of the secretary as receiver. However, an action for the return of specific property which could have been recovered from the institution of which he is receiver may be maintained against the secretary in his name as receiver of the institution.

C. Any action at law or in equity, based upon a cause of action against the institution of which the secretary is receiver, which may be brought against the secretary as receiver, shall be instituted only in the court in which the certificate of possession is filed.

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IN THE

Supreme Court of the United States.

No. 559. October Term, 1936.

GENERAL BAKING COMPANY (Plaintiff-Appellant in the Courts Below),

Petitioner,

v.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE (Defendants-Appellees in the Courts Below),

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER.

As to Respondents' counter-statement of the facts.

The Petitioner feels obliged to direct the attention of the Court to the pleadings that the Court may ascertain what facts are established thereby and admitted by the Respondents. Pages three to twenty-one of the Record may be ignored, as those pleadings were superseded by the amended bill as amended (R. pp. 27 to 47), and the answer thereto (R. pp. 47 to 54).

Under Supreme Court Equity Rule number 30, all facts alleged in the Bill and not denied in the Answer thereto are taken to be admitted. This Court is therefore respectfully requested to disregard the argumentative statements and conclusions in the Respondents' amended Answer.

For the convenience of the Court, the pertinent paragraphs of the Bill of Complaint and the corresponding Answers thereto are as follows:

Bill as Amended

"8. On or about August 25, 1925, your orator entered into an oral agreement with the Franklin Trust Company, the terms and conditions of which were:

"(a) Your orator would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a 'Disbursement Account'." (Rec. p. 31.)

"(b) On Wednesday of each week, your orator would forward from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account:

Answer as amended

"8. Your deponents qualify the averments of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"The facts alleged in subdivisions A and B of paragraph 8 of the amended Bill of Complaint, as amended, are admitted." (Rec. p. 48.)

Bill as Amended

"(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to your orator, or its depository in New York City; said account to be known as a 'Deposit Account'." (Rec. pp. 31-32.)

Answer as amended

Defendants qualify the allegations in sub-division C of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or

Bill as Amended

"(d) The Franklin Trust Company would select, subject to the approval of your orator, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the

Answer as amended

its depository." (Rec. p. 48.)

"The defendants qualify sub-division D of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit ad-

Bill as Amended

drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to your orator or its depository in New York City." (Rec. p. 32.)

"(e) That your orator might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby your orator would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check." (Rec. p. 32.)

Answer as amended

vice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's 'deposit account' in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City." (Rec. p. 48.)

"Defendants qualify sub division E of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

"Defendants have no knowledge that the agreement as therein set forth was entered into by the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material, demand proof thereof. Defendants aver, moreover, that the allegation that said contract was entered into for the sole benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant." (Rec. p. 49.)

Bill as Amended

Answer as amended

"Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in sub-division E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said 'deposit account' and in the outlying banks, in accordance with the agreement of the parties as set forth in subdivisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which

Bill as Amended

"12. In accordance with clause (e) of the agreement (referred to in Paragraph 8 hereof) your orator, at the special request and for the sole benefit of the Franklin Trust Company, did, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby the Franklin Trust Company was allowed to use certain sums for certain periods of time, instead of forwarding to your orator, or its depository, in New York City. The sums left by your orator in accordance with these special agreements were subject to call by check signed by authorized officers of your orator. The approximate dates of said agreements, the total sums used, and the dates when the sums were called are as follows:

Answer as amended

said funds were in the possession of Franklin Trust Company and/or the outlying banks, and that there was thus created the relaship of depositor and depository with all the rights and responsibilities implicit therein." (Rec. p. 49.)

"12. Defendants admit the allegations in paragraph 12 of the amended Bill of Complaint, as amended, with the qualification that they deny that the funds deposited by the complainant, as therein alleged, were deposited at the special request and for the sole benefit of the Franklin Trust Company. Defendants further aver that, in accordance with the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, the General Baking Company authorized the Franklin Trust Company to retain and use all funds deposited by the General Baking Company in the Franklin Trust Company or

Bill as Amended

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		440,000.00
Called by three checks:		
One dated March 29, 1928...	140,000.00	
One dated April 4, 1928.....	100,000.00	
One dated April 12, 1928....	200,000.00	440,000.00
June, 1928		100,000.00
Called by check dated June 29, 1928	$100,000.00	$100,000.00"

(Rec. p. 34.)

Answer as amended

in the outlying banks, whether deposited in the account known as 'Deposit Account' or otherwise,' and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein." (Rec. p. 50.)

"14. From August, 1930, until October 5, 1931, or thereabout, your orator carried out and performed all of its obligations under the terms of the said agreement (referred to in Paragraph 13 above), and in accordance with Clause (f) thereof, at the oral request of the

"14. Defendants admit the allegations of paragraph 14 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to the agreement, as set forth in paragraph 13 of the amended Bill of Complaint, as amended, the defendants

Bill as Amended

Franklin Trust Company, your Orator orally agreed to, and did, allow the Franklin Trust Company to use during September and the early part of November, 1930, sums totalling $100,000.00 which were called by check, dated November 18, 1930, in the amount of $100,000.00." (Rec. p. 36.)

"20. The total amount of cash, drafts and checks delivered by your orator to the said correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose set forth in Clause (e) of said agreement (referred to in Paragraph 13 hereof), was $32,403.26, which sum was in possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow pending a determination by this Court as to whom it should be paid." (Rec. p. 37.)

"24. The cash, together with the proceeds from the drafts and checks in the amount of $49,590.17 (referred to in Paragraph 21

Answer as amended

incorporate by reference their reply to said paragraph in this Answer, and with the further qualification that the defendants have no knowledge that the funds deposited with the Franklin Trust Company were so deposited at the oral request of the Franklin Trust Company, and if the same be material, defendants demand proof thereof." (Rec. p. 51.)

"20. Defendants admit the allegations in paragraph 20 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, subdivision E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer." (Rec. p. 52.)

"24. It is admitted that cash, together with proceeds from the drafts and checks in the amount of $49,590.17, referred to in paragraph 21

Bill as Amended

hereof) were diverted to, and mingled with, the cash funds of Franklin Trust Company, without your orator's consent or approval." (Rec. p. 38.)

"25. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, were augmented to the extent of $49,590.17 by your orator's delivery to the Franklin Trust Company of the said cash, drafts and checks (referred to in Paragraph 21 hereof)." (Rec. p. 38.)

Answer as amended

of the amended Bill of Complaint, as amended, were mingled with the cash funds of the Franklin Trust Company without first obtaining complainant's specific consent or approval therefor. It is averred that by and under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, consent and approval were given by the General Baking Company to the Franklin Trust Company to divert said funds to and mingle said funds with the general funds of the Franklin Trust Company." (Rec. pp. 52-53.)

"25. The averments of fact in paragraph 25 of said amended Bill, as amended, are admitted to be true." (Rec. p. 53.)

Bill as Amended

"26. The cash funds of the Franklin Trust Company, of which defendants took possession and control, have been, at all times since the Franklin Trust Company accepted from your orator the cash, drafts and checks (referred to in Paragraph 21 hereof) and now are, in excess of the total amount of said cash, and the proceeds of said drafts and checks." (Rec. p. 38.)

"27. There were, and now are, assets of the Franklin Trust Company in the possession and control of the defendants sufficient to pay in full your orator and all other preferred claimants." (Rec. p. 38.)

Answer as amended

"26. The averments of fact in paragraph 26 of said amended Bill, as amended, are admitted to be true." (Rec. p. 53.)

"27. The averments of fact in paragraph 27 of said amended Bill, as amended, are admitted to be true." (Rec. p. 53.)

It is evident that Respondent has not denied Petitioner's averments. Likewise, Respondents' averments of their interpretation of the exhibits and averments of their conclusions neither establish facts nor amount to a denial of Petitioner's averments of facts.

As to Respondents' argument on the question of jurisdiction.

On page 10 of Respondents' brief one of the reasons assigned why the Federal Court does not have jurisdiction in this case is that the Respondents are mere stakeholders and that there are other indispensable parties to this litigation. Nevertheless Respondents accepted the decision of the Federal Court when it decided the case in their favor on the merits and did not file a cross appeal challenging the exercise of the court's jurisdiction. Consequently, petitioner thought it unnecessary to print the opinion of Judge Dickinson and the agreement entered into as a consequence thereof for the Record before the Circuit Court of Appeals. Inasmuch as the Respondents have seen fit to assert to this Court that they are stakeholders, counsel are duty bound to petitioner to set forth in full the agreements between the parties with respect to this litigation.

When the Respondents closed the doors of the Franklin Trust Company there immediately arose a dispute as to who was the owner of the cash deposited in the correspondent banks. The Respondents were attempting to collect the funds in the banks located in New Jersey, Eastern Pennsylvania and Delaware. The Petitioner was also attempting to collect them, and in pursuance thereof Petitioner's Counsel sent a letter on November 2, 1931, to all of the said banks reading as follows:

CONLEN, LABRUM & BEECHWOOD
PACKARD BUILDING
PHILADELPHIA

November 2, 1931

TO THE OFFICERS OF MECHANICS NATIONAL BANK,
Trenton, N. J.

Gentlemen:

We represent the General Baking Company, which has made certain deposits for collection at your Bank.

You are hereby advised that all checks, drafts, notes and other evidences of indebtedness, as well as cash deposited at your Bank, are the property of and belong to the General Baking Company.

You are hereby notified not to give, grant, or sell, assign or set over by way of credit memorandums, exchange of debits and credits, set offs or counterclaims, or in any other manner or form, any of the above mentioned property to the Secretary of Banking for the Commonwealth of Pennsylvania, in possession of the Franklin Trust Company, Philadelphia, or to the Franklin Trust Company, its successors or agents.

Very truly yours,

CONLEN, LABRUM & BEECHWOOD

By GEORGE E. BEECHWOOD

Ten days thereafter petitioner filed the bill of complaint in the District Court to restrain the Respondent from attempting to collect said funds from the aforesaid banks, and on November 12, 1931, his Honor, Judge Dickinson, after argument on petitioner's motion for injunction entered the following opinion:

"Upon the condition that defendant stipulates that a separate account will be kept of all moneys collected or received, which are subject to the claim of the plaintiff in the Bill, to the end that whatever claim or title or otherwise which the plaintiff has to said moneys may be asserted to and against the sum in the hands of the defendant, the motion for preliminary injunction is denied."

On November 24, 1931, petitioner's counsel addressed a letter to the then counsel for the Respondents reading as follows:

CONLEN, LABRUM & BEECHWOOD
PACKARD BUILDING
PHILADELPHIA

November 24, 1931

Re: General Baking Company—Franklin Trust Company
CHARLES S. WESLEY, ESQ.,
1000 Packard Building,
Philadelphia, Pa.

Dear Mr. Wesley:

We address you as counsel for William D. Gordon, Secretary of Banking in possession of the property and business of the Franklin Trust Company, Fifteenth and Chestnut Streets, Philadelphia, and John J. Sullivan, Special Deputy in charge.

On November 12, 1931, a Bill of Complaint was filed in the Eastern District Court entitled, General Baking Company v. William D. Gordon, Secretary of Banking for the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, a corporation, and John J. Sullivan, Special Deputy in charge, September Term, 1931, No. 6783, in Equity. Service

of the writ of subpœna and the Bill has been accepted by you and your appearance has been entered for the defendants.

One of the purposes of the Bill is to impress a trust upon certain cash funds deposited on the 3rd and 5th days of October, 1931 in the Franklin Trust Company and various outlying banks, to wit:

First Mechanics National Bank, Trenton, N. J.
Wayne Title & Trust Company, Wayne, Pa.
West Jersey Trust Company, Camden, N. J.
First National Bank, Pleasantville, N. J.
Allentown National Bank, Allentown, Pa.
National Bank of Chester Valley, Coatesville, Pa.
Delaware County National Bank, Chester, Pa.
Farmers National Bank, Reading, Pa.
Wilmington Trust Company, Wilmington, Del.

In addition there were deposited for collection certain checks, drafts and other evidences of indebtedness with all of said banks, including the Franklin Trust Company, from which cash and/or money was realized. Another purpose of the Bill is to impress a trust on the funds realized from the collection of said checks, drafts and other evidences of indebtedness.

You will recall that on November 12, 1931 a motion for preliminary injunction was also filed in the above-entitled matter, praying that William D. Gordon and John J. Sullivan be restrained from demanding, collecting or attempting to collect any moneys in the outlying banks, and upon a hearing of said motion Judge Dickinson entered an order denying the motion, upon condition

"that the defendant stipulates that a separate account will be kept of all moneys collected or received, which

are subject to the claim of the plaintiff in the Bill, to the end that whatever claim of title or otherwise which the plaintiff has to said moneys may be asserted to and against the same in the hands of the defendant."

To avoid multiplicity of suits and the costs incident thereto and to comply with Judge Dickinson's order as counsel for the plaintiff we hereby agree that the money in the said outlying banks shall be collected by the defendants and deposited in a special, separate account with a financially sound and reputable Philadelphia Banking Institution, in the names of one or both of the defendants, subject nevertheless to the terms of this agreement. Said account shall remain undisturbed until a final determination of the above-mentioned litigation either by the District Court or any appellate court, and/or it may be withdrawn upon the mutual written consent of either of the defendants, or their successors, and the General Baking Company.

The agreement is to be without prejudice to the rights of either party, it being the intendment of the parties hereto that all of the rights of said parties shall remain the same as if the funds had remained in the possession and control of the outlying banks.

If you agree to the above please advise us in writing and this letter and your answer thereto will constitute the agreement.

Immediately upon receipt of your letter we will notify the outlying banks to honor at once the checks and/or drafts of the defendants.

Very truly yours,

CONLEN, LABRUM & BEECHWOOD

By GEORGE E. BEECHWOOD

On December 2, 1931, petitioner's counsel received from Respondents' counsel a letter reading as follows:

LAW OFFICES
One Thousand
PACKARD BUILDING

CHARLES S. WESLEY
J. W. MCWILLIAMS
G. A. TROUTMAN
C. B. WAGONER
G. B. WALKER
D. H. HAMILTON

TUSTIN AND WESLEY

PHILADELPHIA, December 2nd, 1931.

In re: General Baking Company—
Franklin Trust Company

GEORGE E. BEECHWOOD, ESQ.
1504 Packard Building,
Philadelphia, Pa.

Dear Mr. Beechwood:

Referring to your letter of November 24th, 1931, addressed to me, which I in turn forwarded to John J. Sullivan, special deputy as agent in charge of the Franklin Trust Company, I have received a reply from Mr. Sullivan authorizing me, on his behalf, to approve the terms outlined in your letter with the exception of the sentence beginning, "Said account shall remain undisturbed until a final determination of the above mentioned litigation either by the District Court or any appellate court and/or it may be withdrawn upon the mutual written consent of either of the defendants or their successors and the General Baking Company".

Mr. Sullivan informs me that he will not agree to the latter part of that sentence which reads as follows: "and/or

it may be withdrawn upon the mutual written consent of either of the defendants or their successors and the General Baking Company".

It is my understanding that it is agreeable to you to proceed with the course of action outlined in your letter of November 24th, with the above noted qualification. Mr. Sullivan informs me that he will open a special account in the Market Street National Bank to the credit of "William D. Gordon, Secretary of Banking in possession of the Franklin Trust Company of Philadelphia, Special", and into this account will go only the funds which are claimed by the General Baking Company.

Will you kindly confirm our qualified understanding as set forth above, and also immediately instruct each of the banks mentioned in your letter to honor Mr. Sullivan's draft? We will advise Mr. Sullivan to put the drafts through immediately.

Very truly yours,

L. S. WESLEY.

CBW:C

On December 3, 1931, petitioner's counsel, pursuant to the agreement, wrote a letter to all of said banks reading as follows:

CONLEN, LABRUM & BEECHWOOD
PACKARD BUILDING
PHILADELPHIA

December 3, 1931

MECHANICS NATIONAL BANK,
Trenton, N. J.

Gentlemen:

Referring to our letter to you of November 2, 1931 and subsequent correspondence and oral communication in

re General Baking Company-Franklin Trust Company, you are now hereby advised that the General Baking Company has now reached a satisfactory agreement with the Secretary of Banking in possession of the property of the Franklin Trust Company, with regard to the funds deposited in your Bank by the General Baking Company to the credit of the Franklin Trust Company.

By this agreement the necessity to litigate the rights in each case of the various outlying banks will be avoided by the litigation now pending in the Federal District Court for the Eastern District of Pennsylvania. The funds are to be collected by the Secretary of Banking and deposited in a separate account, subject to the determination of the pending litigation.

We, therefore, now advise you that it is in order for you to honor a check or draft of the Secretary of Banking and/or the Special Deputy in charge, John J. Sullivan, in respect to the deposits above referred to.

We wish to thank you, on behalf of the General Baking Company, for your splendid indulgence and co-operation in the premises,

Very truly yours,

CONLEN, LABRUM & BEECHWOOD

By GEORGE E. BEECHWOOD

It will be observed that the letters constituted the agreement between the parties, and that in reality, the situation is the same as it would have been had the Respondents instituted suit against the various banks to recover the funds in question and the Petitioner had begun a similar suit, and each of the banks had paid the fund into court and impleaded the Petitioner and Respondents.

The Market Street National Bank in Philadelphia is the stakeholder and the Respondents are in no sense of the word stakeholders.

The Statutes from which the Respondents receive their authority vests in them the right to sue for the recovery of property which they are seeking here to recover. The Statutes also expressly provide that the Respondents may be sued for the recovery of specific property.

The other argument of the Respondents that if the Federal Court entertains jurisdiction of this suit it will interfere with the orderly procedure of the liquidation of the Franklin Trust Company is answered by the fact that in order for the Respondents to have recovered the funds from the correspondent banks without petitioners agreeing thereto, the Respondents would have had to sue each and every one of said banks in the various states, and those suits would not have been in the Court of Common Pleas of Philadelphia County, and Petitioner would have intervened and asserted its title to the fund.

Aside from the foregoing it is difficult to understand how a determination by a Federal Court of Petitioner's rights in any way interferes with any res in the possession of the Respondents. A situation might arise where such an adjudication would so interfere, but it does not exist in the present controversy. To follow the Respondents' argument on this point to its logical conclusion means that any State may by an elaborate statutory scheme for the liquidation of corporations oust the jurisdiction of the Federal Courts in matters where citizens of other states have claims against corporations in liquidation.

Petitioner again reiterates that the Respondents were satisfied with the decision of the lower court when the deci-

sion was in its favor on the merits, and that no cross appeal was taken from the exercise of such jurisdiction. Petitioner also directs the Court's attention to the fact that when the Circuit Court of Appeals in its first decision decided the case on the merits against the Petitioner, the Respondents were satisfied that the Court had not abused its discretion in exercising jurisdiction. It was only when the Circuit Court of Appeals granted Petitioner's petition for reargument on the merits and indicated very strongly during the reargument that it had erred on the merits that Respondents became interested in the jurisdictional point. There is no doubt but that an appellate Federal Court may of its own motion dismiss the proceedings when the Court is in fact without jurisdiction. However, in the present proceedings, the Federal Court has undoubted jurisdiction. The question is whether the District Court abused its discretion in the exercise of that jurisdiction, and it is fatal to the Respondents not to have appealed from the original ruling of Judge Dickinson ordering the fund placed in escrow. They acquiesced and agreed to the same. In respect to this reference is made to the case of *Morley Construction Company v. Maryland Casualty Company*, 81 L. ed. 323, decided by this Court on February 1, 1937, in which it was held that an appellate court may not modify a decree for the benefit of the Appellee (Respondents) in the absence of a cross appeal.

As to Respondents' Argument on the Merits.

On page 39 of Respondents' brief there is a quotation from Judge Kirkpatrick's opinion as to why he decided against the Petitioner on the merits. The same reasoning is urged upon this Court. The quotation reads:

> "The fact that the parties contemplated and actually made subsequent arrangements by which large

> amounts of money in the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to change the character of the deposit or the relationship created thereby is more than merely suggestive. What could be the purpose of these special arrangements unless it was understood all along that the money on deposit was being used by the Trust Company in its general banking business and it was desired to give them the use of more money for a longer time?"

A conclusion that nothing was said or done to change the character of the deposit or the relationship between the parties, does violence to the facts as established by the pleadings. The pleadings establish, beyond a doubt, that it was contemplated at the time of the original agreement that the petitioner might enter into, from time to time, separate and distinct agreements with the Franklin Trust Company whereby your Petitioner would allow the Franklin Trust Company to use a certain amount of the funds accepted by the Franklin Trust Company for the purpose of forwarding them to New York for certain periods of time, and that thereafter such funds were to be called by the Petitioner's check only, instead of being forwarded by the Franklin Trust Company, and that under such agreements and no other, would said funds ever become subject to check. It is admitted by the Respondents that such agreements were entered into, and that the Franklin Trust Company was allowed to use such funds. The agreement was that the petitioner might agree *to allow* the Franklin Trust Company *to use* certain amounts of the funds for a *definite period of time,* and *not* that the Petitioner might agree to allow the Franklin Trust Company *to continue to use* the funds for a longer period of time. The very fact

that the agreement contemplated that the petitioner might allow the Franklin Trust Company to use the cash for stated periods excludes the thought that the Franklin Trust Company could use the cash under any other circumstances. Certainly it cannot be said that nothing was said or done to change the character of the deposit. What was said and done was that the Petitioner agreed with the Franklin Trust Company that it would release it from its obligation to apply the cash to the purpose for which it was accepted and allow the Franklin Trust Company to use such cash for certain stated periods of time. When this was done, the relationship between the Franklin Trust Company and the petitioner became that of debtor and creditor and the funds became subject to the ordinary incident of check. With respect to the cash in question, no such agreement was entered into—the Franklin Trust Company was not released of its obligation to apply the cash to the purpose for which it was accepted.

On page 41 of the Respondents' Brief and in Judge Kirkpatrick's opinion, it is indicated that part of the consideration moving to the Petitioner was that the Franklin Trust Company was to deliver weekly payrolls to the Petitioner's branches. Petitioner asks the Respondents to point to any allegations in their Answer wherein it is averred that the Franklin Trust Company was to make up the payrolls for the Petitioner. It is true that the Franklin Trust Company, prior to the date the oral agreement was entered into, on August 25, 1925, wrote letters to the Petitioner suggesting that the Franklin Trust Company make up the payrolls as an inducement to Petitioner (R. pp. 39 to 41). However, the Petitioner in its answer to these letters makes no mention of the Franklin Trust

Company making up the payrolls. There is no mention made of it in the oral agreement and it is not averred as a fact in the Respondents' answer, nor even suggested.

The entire argument of the Respondents is based upon the fact that no express words called the transaction a trust relationship, and no express words forbade the Franklin Trust Company to apply the funds to a purpose other than that for which they were accepted. However, it is submitted that there was a clear understanding between the parties that the Franklin Trust Company was to apply the cash to a particular purpose and that the Franklin Trust Company was not to use such cash unless Petitioner made a special agreement to that effect.

The case of *Blakley v. Brinson*, 286 U. S. 254, relied on by the Respondents to sustain their position and referred to on pages 52, 54, 55, 56, 59, 71, 72 of their brief recognizes that in a fact situation similar to the instant case a trust arises. Mr. Justice Stone said at page 263:

> "The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See Davis v. McNair (C. C. A. 5th), 48 F. (2d) 494; State v. Grills, 35 R. I. 70, 75, 85 Atl. 281; Northwest Lumber Co. v. Scandinavian American Bank, 130 Wash. 33, 39 A. L. R. 922, 225 Pac. 825; State ex rel. Spillman v. American Exch. Bank, 112 Neb. 834, 201 N. W. 895. See contra, Beard v. Independent Dist., 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375, 381; Mark v. Westlin

(D. C.) 48 F. (2d) 609; First Nat. Bank v. Williams (D. C.) 15 F. (2d) 585; Howland v. People, 229 Ill. App. 23; Miller v. Viola State Bank, 121 Kan. 193, 48 A. L. R. 373, 246 Pac. 517; People v. Merchants' & M. Bank, 34 Am. Rep. 532, 78 N. Y. 269; Hecker-Jones Jewell Mill. Co. v. Cosmopolitan Trust Co., 242 Mass 181, 24 A. L. R. 1148, 136 N. E. 333. Such a procedure, if actually carried out, might afford a basis, which is lacking here . . . "

In the case at bar the Petitioner delivered the cash in question to the Franklin Trust Company on a Saturday under an express agreement that cash would be transferred to Petitioner's depository on the following Monday. The Franklin Trust Company accepted the cash with this condition attached to it. Nothing further remained to be said or done by either party except the transfer of the cash to Petitioner's depository. The Franklin Trust Company remained open all day the following Monday but failed and neglected to transfer cash to Petitioner's depository in New York City and instead diverted Petitioner's cash and mingled it with the other cash funds of the Franklin Trust Company without Petitioner's consent or approval. The Petitioner thereafter traced and identified as a matter of law said cash, and the Respondents have paid it over to the Market Street National Bank in Philadelphia as a stakeholder pending a decision of the Federal Courts as to the rights of the respective parties.

With respect to Respondents' argument that the Franklin Trust Company was a purchaser for value of the checks, the fact situation and Respondents' own conduct clearly dispells any such thought. The Court will observe that after the Respondents closed the doors of the Franklin Trust Company, there were returned by the Respondents

to the Petitioner checks totalling $805.68, which Respondents were unable to collect on account of insufficient funds in the banks of the makers thereof (R. p. 37, Par. 21, corresponding Par. of Answer, R. p. 52). The Court will also note that there was returned to the Petitioner from a correspondent bank the sum of $20.85 representing a check which had been returned to said bank because of insufficient funds in the maker's bank (R. 36, Par. 16, and the corresponding Par. of Respondents' answer, R. p. 51). The Respondents thereby admitted that the Franklin Trust Company was not a purchaser for value of the checks and returned them to the Petitioner and took a credit for the total amount thereof. The Petitioner collected them and kept the proceeds. If the Franklin Trust Company had been a purchaser for value of the checks and drafts, Respondent would have collected the money directly from the makers and kept the proceeds derived therefrom for creditors. The argument now advanced by the Respondents is merely an afterthought.

With regard to the Respondents' argument relating to the funds in the correspondent Banks that Petitioner purchased the credit of the Franklin Trust Company, one fact admitted in both the Bill and Answer precludes any such conclusion. The Respondents admit and aver that all such correspondent banks selected by the Franklin Trust Company had to be first approved by the Petitioner before Petitioner would deliver any funds thereto. What possible interest could the Petitioner have had in such banks if Petitioner were purchasing the credit of the Franklin Trust Company? What the parties were thinking about was that all such banks were *agents* of the Petitioner and if any should fail before the funds were transferred, any loss re-

sulting therefrom would be that of Petitioner and not the Franklin Trust Company, and hence Petitioner insisted upon investigating and approving all such banks before delivering any funds to them.

Respectfully submitted,

GEORGE E. BEECHWOOD,
JAMES S. BENN, JR.,
MARK E. LEFEVER,
J. HARRY LABRUM,
WILLIAM J. CONLEN,
CONLEN, LABRUM & BEECHWOOD,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

No. 559. October Term, 1936.

GENERAL BAKING COMPANY,

Petitioner,

v.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE.

I. COUNTER-STATEMENT OF THE CASE.

This case is here on bill and answer. Appellant seeks to establish a preference in a certain deposit account as the result of an agreement entered into between it and Franklin Trust Company (hereafter sometimes referred to as "Franklin") on August 25, 1925, as modified in August, 1930. The crux of the entire case is the effect to be given to this agreement. The agreement as set forth in appellant's bill is considerably qualified by appellee's answer

(R. p. 47-54) which answer makes specific reference to certain exhibits attached to the bill, consisting of letters written by appellant to Franklin Trust Company and by Franklin Trust Company to appellant, both prior and subsequent to the making of the oral agreement of August 25, 1925 (R. pp. 39-46). Appellant's statement of the case is confusing in that what are in reality the averments of its bill appear at first glance to be stated as established facts in the case, and appellant seems to base its argument upon the averments of its bill, without giving due consideration to the qualifications of the answer and the exhibits. Since the case comes up on bill and answer, the qualifications of the answer must be considered.

Appellant states that the terms and conditions of the agreement of August 25, 1925, were as follows:

> "(a) Petitioner would open a checking account with Franklin Trust Company and maintain therein an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a 'Disbursement Account'.
>
> "(b) On Wednesday of each week, petitioner would forward from its New York office to Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;
>
> "(c) Franklin Trust Company would accept from petitioner's distributor in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to petitioner, or its depository, in New York City; said account to be known as a 'Deposit Account'.

"(d) Franklin Trust Company would select, subject to the approval of petitioner, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of petitioner, cash, drafts and checks to be credited to, and subject to the check of Franklin Trust Company only, but earmarked as the funds of petitioner; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to petitioner in New York City, and a credit advice to be sent immediately to Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to petitioner, or its depository, in New York City.

"(e) Petitioner might, at the special request and for the sole benefit of Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with Franklin Trust Company whereby petitioner would allow Franklin Trust Company to use certain sums from those accepted by it for the purposes set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by petitioner's check only, instead of being forwarded by Franklin Trust Company. Under such agreements, and no other, would said fund, ever, become subject to check. (R. 31, 32.)"

Clauses (a) and (b) are admitted by appellee. Appellee's answer to (c) takes exception to the differentiation of the cash from the drafts and checks as set forth in appel-

lant's averment, and also qualifies the averment to the extent that it indicates that the cash, checks and drafts were accepted "for the purpose of" being forwarded to appellant in New York. Appellee's qualified averment of (c) reads as follows (R. p. 48):

> (c) "As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository."

In making this and further qualifications in its answer, appellee makes specific reference to the exhibits attached to appellee's bill. Because these exhibits indicate that there was no differentiation of checks and drafts from cash deposited but that they were all considered as "moneys" to go into the deposit account, and because they likewise indicate that a benefit was to accrue to Franklin Trust Company from these deposits, as well as a purpose of making funds available to appellant in New York, appellee has qualified this averment to the extent indicated. It should also be noted that the qualified answer does not admit that the drafts and checks were accepted "for collection." For

the same reasons, appellee's answer qualifies clause (d) as follows (R. p. 48):

> (d) "It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit advice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's 'deposit account' in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City."

It will be noted that the averment as qualified does not state that the cash, drafts and checks deposited in the correspondent banks were "earmarked as the funds of petitioner".

Clause (e) of the averment is qualified to the extent that it recites that the agreements to permit Franklin Trust Company to use certain funds were for the sole benefit of Franklin Trust Company. Clause (e) as qualified by appellee reads as follows (R. p. 49):

> (e) "Defendants have no knowledge that the agreement as therein set forth was entered into by

the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material, demand proof thereof. Defendants aver, moreover, that the allegation that said contract was entered into for the sole benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant.

"Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in subdivision E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said 'deposit account' and in the outlying banks, in accordance with the agreement of the parties as set forth in subdivisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which said funds were in the possession of Franklin Trust Company and/or the outlying banks, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein."

On page 7 of its brief appellant's statement of the case recites that:

"On Friday, October 2, 1931, there were delivered to Franklin Trust Company for collection, checks and drafts totalling $1,005.52, and on Saturday, October 3, 1931, checks and drafts totalling $8,747.66."

For reasons already set forth, the use here of the phrase "for collection" should be eliminated as not warranted by the averments of the bill as qualified by the answer.

On page 7 of appellant's statement of the case there appears the following:

> "On the same dates there was delivered to Franklin Trust Company cash totalling $40,642.67. This cash was likewise to be forwarded to petitioner's depository in New York City in accordance with the provisions of Clause (c). (R. 37.)"

Appellee objects to the use of the phrase "this cash". The whole question in this case is whether Franklin Trust Company was to have the use of the funds of General Baking Company and furnish its own funds at the required times, or whether it was to segregate from its funds the actual deposits made by appellant and transfer these segregated deposits to New York. It is important to note that the statement of appellant that "this cash" was to be sent to New York,—the very point in dispute,—is not justified by the averments of the bill as qualified by the answer.

On Page 8 of its brief, appellant states that the proceeds of checks deposited with Franklin Trust Company on October 3, 1931, "together with the $40,842.51 in cash, were diverted to and mingled with the cash funds of Franklin Trust Company without petitioner's consent or approval (R. 38)". This statement is based on Paragraph 24 of the amended bill of complaint as amended, and this paragraph is qualified by the corresponding paragraph of appellee's answer to read that the funds "were mingled with the cash funds of Franklin Trust Company without first obtaining complainant's *specific* consent or approval therefor" (R. 52). (Italics supplied.)

On Page 9 of its brief, appellant states that:

"The Amended Bill of Complaint as Amended concludes with a prayer (1) that the court declare petitioner to be the owner of the $32,403.26, and (2) that the court declare the $49,590.17 to be impressed with a trust in petitioner's favor (R. 38, 39)."

As a matter of fact the prayer of the bill went much further, and appellee feels that since a jurisdictional question is involved, the entire prayer should be set forth. It reads as follows (R. 38, 39):

"Wherefore, your orator prays:

"(a) That it be ordered and decreed that the defendants hold in trust for your orator the sum of $49,590.17, accepted by the Franklin Trust Company for the purpose of forwarding to your orator in New York City;

"(b) That it be ordered and decreed that the total sum of $32,403.26, collected by the correspondent banks for forwarding by the Franklin Trust Company to your orator in New York City, and now held in escrow, is the property of, and belongs to, your orator;

"(c) That it be ordered and decreed that your orator has a lien on the assets of the Franklin Trust Company now in the possession and control of the defendants;

"(d) That it be ordered and decreed that your orator has a lien on the sum of $32,403.26, now held in escrow;

"(e) That it be ordered and decreed that the defendants pay immediately to your orator the said sum of $49,590.17, with legal interest thereon from October 5, 1931;

"(f) That it be ordered and decreed that the sum of $32,403.26, together with interest thereon, now held in escrow be immediately paid to your orator;

"(g) That such other and further relief as the equities in this case may require and as your Honors may deem proper be ordered and decreed."

With the foregoing qualifications, appellee is in accord with appellant's statement of the case.

II. ARGUMENT.

Summary.

Appellee contends that the Circuit Court of Appeals for the Third Circuit properly ruled that appellant's bill in equity seeking to establish a preference in the assets of the closed Franklin Trust Company, a banking institution of the Commonwealth of Pennsylvania, should be dismissed by the District Court. Appellee's argument in support of the ruling of the Circuit Court of Appeals may be summarized as follows:

1. Although jurisdiction to entertain appellant's bill in equity existed under the diversity of citizenship clause, the District Court should have refused to entertain jurisdiction because—

(a) Entertaining jurisdiction constituted an interference with the administration by the Commonwealth of Pennsylvania through its executive and judicial departments of the liquidation of a closed banking institution—a quasi public corporation subject to regulation under the laws of the State;

(b) Appellee, as Secretary of Banking of the Commonwealth of Pennsylvania, and Receiver of the Franklin Trust Company, is, under the decisions of the Supreme Court of Pennsylvania, a mere stakeholder, and consequently, the real respondents—the other claimants to the assets of the Franklin Trust Company—are indispensable parties to this litigation, and the failure of appellant to join them in its bill is fatal to its suit.

(c) Appellant's bill seeks to obtain possession and control of a portion of the res being administered by the

state officers, subject to the supervision and control of the state court, and consequently is a proceeding quasi in rem, as to which the District Court should not entertain jurisdiction.

2. If the merits are to be considered, the dismissal of appellant's bill was nevertheless proper, as held by the District Court, and the Circuit Court of Appeals in its original opinion because—

(a) All deposits as to which appellant sought a preference, both of checks and cash, made in the Franklin Trust Company and in correspondent banks of the Franklin Trust Company, gave rise immediately upon deposit to a debtor-creditor relationship between the Franklin Trust Company and appellant. Accordingly appellant is entitled only to the status of a depositor;

(b) No preference as to the checks and drafts still in the possession of the Franklin Trust Company at the time of its closing exists by reason of the Pennsylvania Bank Collection Act of June 13, 1931, P. L. 568, because by that act a bank of deposit is an agent of the depositor for collection only "in the absence of an agreement to the contrary", and in this case such an agreement to the contrary existed.

I. The Federal Courts Should Not Exercise Jurisdiction Over This Controversy.

Appellee admits that the District Court had jurisdiction to entertain appellant's Bill in Equity, since diversity of citizenship existed and the amount in controversy exceeds $3000., exclusive of interest and costs. As was said, however, in *United States v. Bank of New York & Trust Company*, 296 U. S. 463, 480, 80 L. Ed. 331, 340 (1936):

> "The statutory grant of jurisdiction to the District Court leaves open the question of the propriety of its exercise in particular circumstances. Even where the District Court has acquired jurisdiction prior to the State proceedings, the character and adequacy of the latter proceedings, in relation to the administration of assets within the State and the status of those assets, may require, in the proper exercise of the discretion of the Federal Court, that jurisdiction should be relinquished in favor of the State administration."

In that case, as in the case at bar, the question involved was whether a Federal Court should entertain jurisdiction over a proceeding intended to remove from the custody and control of a statutory liquidator, acting under the protection of a State Court, assets which were being liquidated for the benefit of creditors of an insolvent institution. It remains accordingly to determine whether or not jurisdiction should be exercised.

(a) *The Federal Courts should not interfere with the comprehensive scheme of distribution of the assets of a banking institution of the State provided by the State statute.*

This Court has decided in *Pennsylvania v. Williams*, 294 U. S. 176, 79 L. Ed. 481 (1934); *Gordon v. Ominsky*, 294 U. S. 186, 79 L. Ed. 848 (1934); and *Gordon v. Washington*, 295 U. S. 30, 79 L. Ed. 1282 (1934), that the Secretary of Banking of the Commonwealth of Pennsylvania is entitled to proceed with the orderly liquidation of a banking institution, or building and loan association, of which he has taken possession pursuant to the Banking Act of 1923, P. L. 807, 7 P. S. 1-ff., as amended, without interference from the Federal Courts through the appointment of federal re-

ceivers applied for on bills of equity asserting diversity of citizenship as the basis for jurisdiction. In *Pennsylvania v. Williams, supra,* the Court said:

> "The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury, from the waste of the assets of the insolvent corporation which would ensue from a race of creditors to secure payment of their claims by forced sale of the corporate property. By local statutes elaborate provision is made for accomplishing the same end, through the action of a state officer, in substantially the same manner and without substantially different results from those to be attained in receivership proceedings in the federal courts. There is no allegation or contention that the procedure thus provided is inadequate, or that it will not be diligently and honestly followed. In such circumstances the discretion of the district court, invoked by the petition of the commonwealth, should have been exercised to relinquish the jurisdiction in favor of the statutory administration of the corporate assets by the state officer.
>
> The question is not the ordinary one of comity between a federal and a state court, each asserting jurisdiction over the same subject matter, and the same property, and where there are shown no special reasons addressed to the discretion of the court first acquiring jurisdiction for relinquishing its jurisdiction in favor of the other. Compare McClellan v. Carland, 217 U. S. 268, 281, 282, 54 L. Ed. 762, 767, 30 S. Ct. 501; Hyde v. Stone, 20 How. 170, 175, 15 L. Ed. 874, 875; Chicot County v. Sherwood, 148 U. S. 529, 534, 37 L. Ed. 546, 548, 13 S. Ct. 695; Re Chetwood, 165 U. S. 443, 460, 41 L. Ed. 782, 788, 17 S. Ct. 385; with Harkin v. Brundage, 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268, supra; Rogers v. Guaranty Trust Co., 288 U. S. 123, 77 L. Ed. 652, 53 S. Ct. 295, 89 A. L. R. 720; Kansas City Pipe Line Co. v. Fidelity Title & T. Co. (C. C. A. 8th) 217

F. 187; First Nat. Bank v. Horuff (C. C. A. 5th) 65 F. (2d) 319. Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See Amos v. Trust Co. of Florida (C. C. A. 5th) 54 F. (2d) 286, 288.

A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, see United States ex rel. Greathouse v. Dern, 289 U. S. 352, 359, 360, 77 L. Ed. 1250, 1254, 1255, 53 S. Ct. 614, or deny relief upon performance of a condition which will safeguard the public interest and secure substantial justice to the complainant, see Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U. S. 334, 338, 77 L. Ed. 1208, 1211, 53 S. Ct. 602, would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. Fenner v. Boykin, 271 U. S. 240, 243, 244, 70 L. Ed. 927, 928, 46 S. Ct. 492; Massachusetts State Grange v. Benton, 272 U. S. 525, 527, 71 L. Ed. 387, 390, 47 S. Ct. 189; Matthews v. Rodgers, 284 U. S. 521, 525, 76 L. Ed. 447, 451, 52 S. Ct. 217; cf. Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U. S. 264, 273, 78 L. Ed. 307, 313, 54 S. Ct. 154. It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state. See Rogers v. Guaranty Trust Co. supra (288 U. S. 130, 131, 77 L. Ed. 656, 657, 53 S. Ct. 295, 89 A. L. R. 720). Compare Burnrite

Coal Briquette Co. v. Riggs, supra (274 U. S. 212, 213, 71 L. Ed. 1005, 1006, 47 S. Ct. 578); Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 419-423, 76 L. Ed. 837, 840-842, 52 S. Ct. 413; Langnes v. Green, 282 U. S. 531, 541, 75 L. Ed. 520, 526, 51 S. Ct. 243. There are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers. Matthews v. Rodgers, supra (284 U. S. 525, 76 L. Ed. 451, 52 S. Ct. 217)."

The same statute, the Banking Act of 1923, P. L. 809, as amended by the Act of May 5th, 1927, P. L. 762, 7 P. S. § 1-ff. involved in the *Williams* case is before the Court here. It provides for the regulation and supervision of financial institutions, including banking and building and loan associations. Section 21 authorizes the Secretary to take possession of the business and property of a banking institution if its condition is "unsafe or unsound", or if the institution has violated the law or an order of the Secretary; he can take possession only after notice and hearing and after securing the approval of the Attorney General. Section 22 requires the Secretary to file a certificate in his office and in that of the prothonotary of the court having jurisdiction (by Section 19 the Court of Common Pleas of Dauphin County or of the county in which the corporation is located), stating that he has taken possession of the business and property of the institution. The association may, under Section 23, obtain court review of the action by application within ten days for a show cause rule. The Secretary, after giving notice to all persons holding assets of the institution (Section 25), and after taking an inventory of the assets (Section 26), may either suspend or continue the business pending determination

of whether or not to liquidate the affairs of the institution (Section 27). By Section 28 the Secretary is authorized to surrender possession upon the resumption of business by the institution or the sale of its assets to a successor or independent corporation. Section 29 gives the Secretary "except as herein otherwise provided", the status and powers of a receiver of a court of equity. The court having jurisdiction is given, by Section 30, power to enforce orders to enable the Secretary to perform his duties under the Act. Under Section 31 his possession continues until liquidation, resumption of business by the institution, surrender under Section 28, the substitution of liquidating trustees elected by shareholders or appointed by the court as provided in Section 50, or payment of the creditors in full. The Secretary is authorized, with leave of court, to compromise claims (Section 34) and to prosecute or defend suits pending at the time he takes possession, and to sue to recover assets to which the institution has a claim (Section 35). During his possession, no lien shall attach or execution issue against the property of the institution, and no pledgee shall, without permission of the Secretary or order of the court, sell the collateral or pledge (Section 36). Before liquidation, the Secretary must give notice to creditors and depositors (Section 41) and have an inventory and appraisement made by disinterested persons and filed with the prothonotary of the court (Section 38). No claims other than those of depositors shown to be such on the books of the institution, or beneficiaries of or claimants against trust estates, shall be allowed unless the claimant files with the Secretary within four months from the date of notice of taking possession a sworn statement of claim (Section 42). By Section 45 the Secretary must file in court a final or partial account of claims allowed or

rejected, and any party in interest may file objections in the court either to the disallowance of his own claim or the allowance of the claims of others; if no account is submitted within one year, a court order directing its submission may be obtained. Section 46 provides that the account is binding and conclusive, except as to those parts to which objection has been made in court, and directs distribution in accordance therewith. If the account were partial, its confirmation is not conclusive on claims specified in subsequent accounts (Section 47). The court is to hear and determine matters in controversy (Section 48). Expenses of administration are to be paid out of the institution's funds and are subject to the approval of the court (Section 49). Section 50 provides for the election of liquidating trustees by the shareholders, or appointment by the court in default of election, if a balance remains after the final account has been filed and the creditors paid in full.

The decision in *Pennsylvania v. Williams, supra,* establishes that this statute adequately protects the interest of creditors of corporations being liquidated by the Secretary of Banking. The question in the instant case is whether the doctrine enunciated in the Williams case should be followed to its logical conclusion, in order that the Secretary of Banking may complete an orderly liquidation in the state court without being forced to defend actions in the federal courts seeking to dispossess him of part of the assets under his control, brought by persons who are unwilling to file their claims in the manner provided by the State Act.

To require the Secretary of Banking to defend such suits complicates the otherwise simple scheme of distribution provided by the statute. It means that claims can be filed and proved in two places,—first, with the Secretary,

pursuant to the State Act; second, with the federal court. The Secretary is thereby prevented from liquidating the assets entirely in the manner prescribed by the State statute and forced to engage in extended litigation in a different tribunal. Distribution of the assets through the process provided by the State statute is either delayed thereby, or else the claims brought in the federal court are ignored and distribution is completed before the Federal litigation is terminated. Compare *Richle v. Margolies*, 279 U. S. 218, 224 (1929), where the Court said:

> "The power to fix the time for distribution may include the power, in the exercise of judicial discretion, to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim."

Such a result would, of course, be most inequitable and merely gives point to the argument that all questions respecting distribution of the assets in the possession of the Secretary should be determined under the direction and control of the state court, in accordance with the State Act. On no other basis can the principle established in the Williams case be carried into effect as a practical matter.

It should be emphasized that the status of a State officer in liquidating a quasi public corporation, pursuant to a statutory scheme of distribution prescribed by State law, is quite different from that of private litigants who attempt to evade the jurisdiction of the federal courts, in cases where diversity of citizenship is involved, on the plea that an adequate and exclusive remedy is provided in a state tribunal. A State statute cannot, of course, restrict federal jurisdiction, but where such a statute outlines a comprehensive State policy for dealing with the affairs of a semi-public State corporation, federal courts of equity, in

the exercise of their discretionary powers, should decline to take action which cannot fail to hinder, impede, and delay the procedure set up by the State for dealing with semi-public corporations of its own creation.

As pointed out by Justice Stone in *Pennsylvania v. Williams, supra,* such is the rule where interference with the internal affairs of a domestic corporation of the State is concerned. See *Rogers v. Guaranty Trust Co.,* 288 U. S. 130. And there are stronger reasons for adopting a like practice where the State has prescribed a complete system of distribution of the assets of its own banking institutions by one of its own officers.

Since it has been determined in *Pennsylvania v. Williams, supra,* and the other cases referred to above, that the Secretary of Banking, as opposed to federal receivers, should liquidate the assets in question, he should be given all of the rights and privileges which would inure to the benefit of a technical receiver of the State Court. Among the most important of these benefits is the right to have determined in the Court of the receivership all questions affecting title or prior claim to the assets being liquidated.

In determining whether State Banking Commissioners liquidating insolvent State institutions were subject to suit in federal courts, the district courts and the circuit courts of appeals have been inclined to base their conclusion upon whether or not the state statute made the commissioner a receiver of the state court. It is submitted that this distinction is a sterile one. The real test should be whether the proposed suit interferes with the orderly administration of the assets of the institution in question under the control of the commissioner or secretary. If it does, the federal court should not entertain jurisdiction.

In the instant case, as pointed out above, the attempt is to deprive the Secretary of a portion of the assets under his control, and this without permitting the other interested parties, *i. e.*, depositors and creditors of the bank, to be heard. Such a proceeding cannot fail to interfere with the orderly administration of the estate.

(b) *The Federal Courts should refuse to entertain jurisdiction of the present controversy because indispensable parties are not before the Federal Court.*

If the Secretary is required to defend suits brought against him in the federal courts, he is converted from a mere stakeholder into a party litigant in violation of the scheme of liquidation prescribed by the State statute. In *Franklin Trust Company of Philadelphia Case*, 319 Pa. 193 (1935), the Supreme Court of Pennsylvania, following earlier decisions, refused to permit the Secretary of Banking to appeal from a decree of the court of Common Pleas No. 5 of Philadelphia County in which he had filed his first accounting of the assets involved in the case at bar. The decree in question established a preferred claim to certain of the assets held by the Secretary as Receiver. The Court said:

> "The appeal of the Secretary of Banking . . . is, upon the motion of the appellee, quashed. We find from the agreed stipulation of the facts that he has neither an equity nor a legal interest, other than that of a mere stakeholder, in the decree from which this appeal is taken, and so he has no standing to appeal; Cameron v. City Bank of New York, 284 Pa. 187, 130 A. 407; Cameron v. Carnegie Trust Co., 292 Pa. 114, 117, 140 A. 768."

Because the statutory liquidator (in that case, the Superintendent of Insurance of the State of New York)

was only a stakeholder, this Court, in *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, held that the federal courts should decline to entertain jurisdiction over a claim to the assets in the hands of the liquidator unless and until all other parties claiming such assets had been joined as parties, saying (p. 480):

> "In the instant cases, not only had the state court first acquired jurisdiction, but there are numerous persons whose claims in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States, they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved. *They have not been made parties to the present suits, and this fact in itself would be a sufficient reason for the District Court to refuse to proceed in their absence.* Only the stakeholders are defendants. The adverse claimants are parties to the respective proceedings in the state court, and from every point of view the principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected." (Italics supplied.)

So, in the instant case, the depositors and other creditors of the Franklin Trust Company are entitled to be heard in the state court. They are powerless to assert their interests in the federal court. The Supreme court of the State has ruled that the Secretary of Banking is only a stakeholder. Yet, in the present proceedings, he is forced to undergo the expense of extensive litigation in the federal courts in order to prevent a substantial portion of the assets in his control from being removed from his possession. It is submitted that the Federal Courts should refuse to entertain jurisdiction of appellant's bill and re-

quire it to file its claim in the State Court where all interested parties can appear of record.

(c) *Appellant's bill seeks to obtain possession and control of a portion of the res being administered by the Secretary of Banking under the supervision and control of the State Court; it is, accordingly, a proceeding quasi in rem, of which the Federal Court should not entertain jurisdiction.*

It should be noted that, despite the contention of the appellant to the contrary, the present proceedings were not instituted merely to liquidate a claim. The prayer of the amended Bill (R. pp. 38-39) is that it be ordered and decreed that certain of the assets in the possession of the Secretary of Banking are held in trust for the appellant, that the appellant has a lien on such assets, and that the appellee shall pay immediately to the appellant the sums of money as to which it is asserted a trust arises.

It matters not whether the present proceeding is strictly in rem. The vital point is that the appellant attempts to withdraw from the possession and control of the Secretary of Banking, as supervised by the State Court, a portion of the res which he is in the process of administering. The bill for an accounting as filed in *United States v. Bank of New York & Trust Co., supra,* was not *per se* an action in rem. Yet, this Court held (296 U. S. 477) that, since the proceedings in the state court were quasi in rem, and since control of the funds was essential to the exercise of that Court's jurisdiction to protect the rights of the claimants, the Federal Courts should decline to entertain jurisdiction of the bill. The Court stated (p. 477):

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction

over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has actually been seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property. Farmers Loan & T. Co. v. Lake St. Elev. R. Co., 177 U. S. 51, 61, 44 L. Ed. 667-671, 20 S. Ct. 564. If the two suits are in rem, or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must, of necessity, yield to that of the other. Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189-195, 79 L. Ed. 850-55, 55 S. Ct. 386. This principle is applied in the discharge of the long recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the union so that they may cooperate as harmonious members of a judicial system coextensive with the United States' " (citing cases).

In that case, as here, it was urged that the suit in the federal court was not in rem but in personam, and that to allow the federal court to pass upon the right asserted would not necessarily interfere with the jurisdiction or control of the state court—or here, the Secretary of Banking acting under the control of the state court—over the res. This Court held, however, that the suits were not merely to establish a debt, or a right to share in property, but included a demand that the depositaries accounting pay over to the complainant, as the sole and exclusive owner, the entire funds in their hands. In that case the entire funds were sought. Here, only a portion of the assets is claimed. The

principle, however, is identical. The object of the suits is to take property from the Secretary of Banking, where it is under the control of the state court, and to vest it in the complainant to the exclusion of all those whose claims are being adjudicated in the state proceedings.

Vacuum Oil Co. v. Land Title Guaranty & Trust Co., 80 F. (2d) 476 (C. C. A. 6th, 1935) decided prior to the decision of this Court in *United States v. Bank of New York & Trust Co*, *supra*, held that the federal court could properly entertain jurisdiction of a bill in equity against the Ohio State Superintendent of Banks asking for an accounting and a payment over to the plaintiff of the sum of $35,000. deposited with a closed bank being liquidated by the Superintendent, under an escrow agreement which it was claimed created a trust fund of the sum involved. The case quite clearly conflicts with the later decision of this Court in the *New York Bank & Trust Company* case which, as noted above, was also a bill for an accounting. Accordingly, it must be deemed to have been overruled by that case and, consequently, to have no bearing on the case at bar. The basis of the decision was that the bill for an accounting was essentially an action in personam but, as pointed out in the *New York Bank & Trust Company* case, the effect of the prayer of the bill is to remove from the possession and control of the statutory liquidator a part of the res in the process of liquidation. Accordingly, the action is quasi in rem and jurisdiction will not be entertained by the federal courts.

It may be suggested that the Secretary of Banking is not a receiver of the state court and that, accordingly, he is not entitled to the protection afforded to a court officer. Cases can be referred to where state banking commissioners, under statutes somewhat different from that of Pennsylvania, have been required to submit to suit in the federal courts where the object sought was to establish

claims and priorities to the assets being liquidated and distributed. Compare *Allen v. United States*, 285 Fed. 678 (C. C. A. 1st, 1923); *MacDonald v. Guy*, 63 Fed. (2d) 334 (C. C. A. 1st, 1933); *Amos, Comptroller of State of Florida v. Trust Co. of Florida*, 54 Fed. (2d) 286 (C. C. A. 5th, 1931); *Interstate Trust & Banking Co., et al., v. Jones County (Miss.)*, 77 F. (2d) 806 (C. C. A. 5th, 1935). In these cases, however, the statutes of the particular states in question had either been construed by the highest court of the state so as to make the Commissioner subject to suit in any court of appropriate jurisdiction, or were so interpreted by the federal court in which the issue was raised. The Pennsylvania Act in Section 29 (1923 P. L. 809) 7 P. S. 29, as pointed out above, provides:

> "Except as herein otherwise provided, the Secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers and duties of a receiver appointed by any court of equity in this Commonwealth;"

Moreover, the entire process of liquidation is subject to the control of the state court as appears from the summary of the statute on pages 15-17 of this brief.*

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*Although passed after the present suit was instituted, the provisions of the Department of Banking Code of May 15, 1933, P. L. 565, 71 U. S. 733, are important as showing the present law of Pennsylvania respecting the status of the Secretary of Banking when he takes possession of a banking institution for purposes of liquidation. Article VI, Section 601, of the Code provides:

> "Whenever the (Banking) Department takes possession of the business and property of an (banking) institution, the Secretary shall, by operation of law, simultaneously take over such possession from the Department and become Receiver of such institution subject to the provisions of this Act. His official title, when thus in possession of the business and property of an institution, shall be Receiver of such institution."

Whether or not the Secretary by this provision becomes technically a receiver of the Court of Common Pleas,

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Section 701 of Article VII of the Code provides:

"Except as otherwise provided in this Act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the Court in which the certificate of possession is filed and not to any other Court. His rights, powers and duties shall be those of a general Receiver appointed by any Court of Equity in this Commonwealth, except as such rights, powers and duties are increased or limited by the provisions of this Act."

Section 709 of Article VII of the Code provides:

"The Court in which the certificate of possession is filed shall sit as a Court of Equity. It shall have the power, upon petition of the Secretary, to make and enforce any appropriate order to enable him, with the utmost dispatch, to discharge his duties in connection with the business and property of any institution of which he has taken possession, as Receiver, pursuant to the provisions of this Act."

Sub-section B of Section 713 of Article VII of the Code provides:

"B. All claims against the institution, suit upon which has not been commenced prior to the time the Secretary took possession, shall be presented in the regular manner provided by this Act for presentation of claims. Neither a depositor or other creditor of the institution, nor any other claimant, may maintain any action at law or in equity upon such claim, except by regular method provided by this Act for exceptions to the accounting of the Secretary as Receiver. . . ."

Sub-section C of Section 713 of Article VII provides:

"C. Any action at law or in equity, based upon a cause of action against the institution of which the Secretary is Receiver, which may be brought against the Secretary as Receiver, shall be instituted only in the Court in which the certificate of possession is filed."

The above Act makes clear the policy of the State to give to the liquidation of an insolvent banking institution the status of a receivership in the State Court. That policy this Court stated in *Pennsylvania v. Williams, supra,* should be respected by Federal Courts of Equity in exercising their discretionary power. It is, of course, true, as suggested in appellant's brief (pp. 19-22), that a state statute cannot limit the jurisdiction of the federal courts. The question here, however, is not whether the District Court had jurisdiction of appellant's bill, but whether, in the exercise of its equitable discretion, it should have refused to hear the controversy and relegated the appellant to his rights in the state court.

in which his certificate of taking possession has been filed, is immaterial. As a practical matter, he is to all intents and purposes the arm of that Court. To it he must account. With it are filed all exceptions to his account. By it are determined all questions relating to priorities and claims to the assets being administered. Surely, it is ignoring the substance of the situation to contend that the state court does not have complete jurisdiction over the disposition of the res consisting of the assets being administered. And, if that court has such jurisdiction, this Court has ruled that the state court alone should pass on all attempts to remove those assets from the possession of the statutory liquidator.

In *United States v. Bank of New York & Trust Co., supra*, the Court said (p. 475):

> "When the state court directed the Superintendent of Insurance to take possession of the assets of the United States branches, and to conserve those assets until its further order, the court took jurisdiction of the res. While the Superintendent was a statutory liquidator, he took possession under the direction of the court and the fund was at all times subject to the court's control."

It was concluded that the control of the state court should not be interfered with through the entertaining by the federal court of the complainant's bill for an accounting.

To the same effect is *Reconstruction Finance Corporation v. Zimmerman*, 76 F. (2d) 313 (C. C. A. 4th, 1935). In that case the Reconstruction Finance Corporation sought an injunction from the Federal District Court for the Eastern District of South Carolina restraining the Conservator of a South Carolina State Bank, in process of liquidation, from paying dividends to depositors before paying off a

loan made by the Reconstruction Finance Corporation. The Conservator had qualified as a Receiver pursuant to a State statute which directed him to conduct the litigation under the supervision of the state court (Act of May 16, 1933, 38 Statutes at Large, 489). He was not, however, appointed receiver by the state court. The Court said:

> "There can be no question that defendants, under the direction of the State Court, were acting as receivers just as much so as if they had been appointed by the Court. The State Court was directing all matters connected with the liquidation and, through the defendants, had such possession of the res as would remove them from the jurisdiction of all other courts."

The plaintiff's bill was dismissed for want of jurisdiction.

People's Trust Company v. United States, 23 F. (2d) 381 (C. C. A. 1st, 1928), illustrates the same argument. There, the State Banking Commissioner of New Hampshire, acting under Chapter 68 of the Laws of the State of New Hampshire of 1911 (which nowhere refers to the Commissioner as a court receiver), upon petition to the state court (which petition the State Act gave the state court no discretion to deny) took possession of an insolvent state bank. The United States filed with the Commissioner a claim for priority for deposits made by postmasters. Thereafter, it brought a bill against the Banking Commissioner in the federal court to establish its claim. The Circuit Court of Appeals for the First Circuit held that the federal court should not entertain jurisdiction of the bill, inasmuch as the liquidation of the bank was being carried on by the State Banking Commissioner under the supervision of the New Hampshire Courts. It was admitted that the federal court had jurisdiction. It was stated, how-

ever, that since the original proceeding against the bank in the state court was a proceeding in rem, and involved the exercise of possession or control over the fund in the custody and possession of the Commissioner, the Federal Court should decline to exercise jurisdiction over the controversy. The opinion points out that the effect of the prior proceeding in the state court is to draw to that court (p. 383)—

> "the possession or control, actual or potential, of the res and the exercise by another court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction (that has already attached) of the court in which the prior action was brought."

It is, therefore, no answer to appellee's contention to assert that the Secretary of Banking is not a receiver, and that the doctrine of comity between courts does not apply. This argument, carried to its logical conclusion, conflicts with the decision in *Pennsylvania v. Williams, supra.* If the Secretary, because he may not be technically a receiver, is not entitled to have determined in the state courts all questions incident to the preservation, collection and distribution of the assets, there is no reason why a federal court, in addition to determining those questions, should not appoint receivers to take charge of the entire liquidation.

Nor can it be contended that the present action can be converted into one in personam and not in rem by molding the decree of the Court so as to adjudicate only the right to the fund, omitting any direction to the Secretary to pay it over to the complainant. In this way, it is claimed, the state court can still adjudicate final disposition of the fund, in accordance with the federal court's order. The

vice in this proposition lies in the requirement that the Secretary must defend extensive litigation in the federal courts and convert himself from a stakeholder into a litigant. As heretofore pointed out, this result does violence to the scheme of the State statute as interpreted by the state court Compare *Franklin Trust Company's Case, supra.* Moreover, the time for filing preferred claims in the state court has long since expired. A decree of this Court directing the Secretary of Banking to accord to appellant a preference in whatever assets of the Franklin Trust Company may now remain in his hands is, consequently, requiring him to violate the State statute by paying a preferred claim barred by that statute.*

If the Secretary of Banking be held to have the status of a receiver of the state court, the difficulties noted above could be avoided through the refusal of a federal court to entertain jurisdiction of a suit against the Secretary as receiver unless permission of the state court was first obtained. This is the rule in receivership cases. *Porter v. Sabin,* 149 U. S. 473; *Barton v. Barbour,* 104 U. S. 126; *Merrywcather, et al. v. United States,* 12 F. (2d) 407 (C. C. A. 9th) 1926; *Mullendore v. American Surety Co. of New York,* 27 F. (2d) 572 (C. C. A. 9th) 1928. No attempt was made by appellant in the present proceedings to secure the consent of either the Secretary of Banking or the state court to the institution of the present proceedings in the United States District Court.

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*This does not mean that appellant would not receive depositor's status in the state court. Section 42 of the Act (Appendix, p. 92) requires that all claims other than those of depositors shall be filed within four months of the date of notice of taking possession by the Secretary. Depositors, however, are not required to file claims if they appear as such on the books of the institution, which, of course, appellant does.

Appellant relies on the line of cases represented by *Byers v. McAuley*, 149 U. S. 608; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33; and *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613 (1936) to sustain its contention that the District Court was required to entertain jurisdiction of the litigation. Those cases hold that suits may be instituted in the federal courts against executors and trustees who are subject to the supervision of state probate courts to establish claims against decedents' estates and other property held in trust. The distinction between these cases and the liquidation of an insolvent banking institution by an officer of the State was summarized in the last cited case as follows (p. 619):

> "The doctrine approved in Pennsylvania v. Williams, 294 U. S. 176, 79 L. Ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850, 55 S. Ct. 386, supra, is not applicable. In each of those cases we found conflict between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the Federal Court should retain jurisdiction; its power generally to render judgment in personam against fiduciaries appointed by State Courts was expressly recognized. Here there are no extraordinary circumstances."

This Court, in the *Bradford* case, differentiated receivership cases from those involving the administration of decedents' estates on the ground that, in the latter class of cases, the property is not in custodia legis. If, as pointed out above, the Secretary of Banking is entitled to the status of a receiver, it would seem to follow that the property in his possession, which is subject to the control of the State

Court, is sufficiently in custodia legis to sustain the distinction.

Nor does *Riehle v. Margolies, supra,* aid the appellant. In that case, this Court held that a suit instituted against a corporation in a state court, prior to the appointment of receivers for the corporation in the federal court, could be prosecuted to judgment and would be res judicata as to the validity of the claim when the judgment was presented in the court of the receivership. No question of the equitable discretion of a federal court to determine for itself whether or not to entertain jurisdiction was involved. The claim sued on in the state court was a contract liability, which was clearly in personam. No attempt was made to interfere in any way with the possession and control of the res constituting the assets of the corporation by the federal court. It could be admitted that if, in the present proceedings, this Court should determine that the District Court was correct in entertaining jurisdiction of appellant's Bill in Equity and should reverse the Circuit Court of Appeals on the merits, the final decree would be res judicata when presented in the liquidation proceedings in the State Court. That is all that is suggested by *Riehle v. Margolies,* although even this result would not necessarily follow in the present case because here the jurisdiction of the state court was invoked before the federal litigation began. The vital question, however, remains whether the Federal Court should entertain jurisdiction of appellant's bill. For the reasons above set forth, it is submitted that the answer should be in the negative.

(d) *Summary of argument on jurisdiction.*

Appellee contends that the Circuit Court of Appeals for the Third Circuit correctly decided that jurisdiction of

appellant's Bill in Equity should not be entertained. In *Pennsylvania v. Williams*, supra, this Court decided that the federal courts should not interfere with the method of distribution of the assets of semi-public corporations of a State, being liquidated by a State officer under a comprehensive State statute, by appointing federal receivers to liquidate such assets. In *United States v. Bank of New York & Trust Co., supra,* this principle was extended so as to preclude determination by the federal courts of suits brought for an accounting and turning over of the assets in the hands of the statutory liquidator of the state court. It is urged that the same principles should restrain the federal courts from passing on a controversy involving an attempt to establish a trust in and compel the payment to appellant of, part of the assets held by a State statutory liquidator, acting under the supervision and control of a state court. Otherwise, it is submitted, the principles of the above cases will lose all significance and the State system of liquidation be impeded and delayed.

It is further urged that jurisdiction should be refused because indispensable parties, i. e., the depositors and other creditors of the insolvent Franklin Trust Company, are not before the Court. If jurisdiction of appellant's Bill is entertained under such circumstances, the statutory liquidator would be converted from a stakeholder, which is his status under the State law, into an active party litigant. Such a result does violence to the State scheme of liquidation and distribution.

Finally, it is suggested that the present proceeding is analogous to an action quasi in rem brought in one court against the receiver of another court, which has already assumed jurisdiction of the res. On familiar principles of

receivership law, it is submitted that the second court will refrain from entertaining jurisdiction over such a bill.

Therefore it is respectfully submitted that the decree of the Circuit Court of Appeals for the Third Circuit entered on September 11, 1936, as corrected by the decree entered on October 16, 1936, directing the District Court for the Eastern District of Pennsylvania to dismiss the bill on jurisdictional grounds should be affirmed.

II. The Circuit Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania properly dismissed appellant's bill upon the merits.

Appellant seeks to assert a preference of $40,842.51 composed of cash deposited in Franklin Trust Company prior to its closing; $8,747.66, the proceeds of checks and drafts deposited in Franklin Trust Company; and $32,403.26, a total of cash, drafts and checks deposited in the correspondent banks of Franklin Trust Company. Appellant asserts a preference in the $40,842.51 cash on the ground that a trust relationship as to it existed between Franklin and appellant. Its assertion of a preference as to the checks in Franklin Trust Company and the checks, drafts and cash in the correspondent banks, is predicated on other grounds. All of these deposits, however, both checks and cash, and in both Franklin Trust Company and its correspondent banks, were made pursuant to the oral agreement of August 25, 1925, as modified in 1930. The checks and cash deposited in Franklin itself were deposited pursuant to clause (c) of the agreement, and the checks and cash in the correspondent banks were deposited pursuant to clause (d) of the agreement. Appellant and appellee differ as to the terms of these clauses, but whether appellant's

or appellee's version of the agreement be accepted, it is evident that the checks deposited in Franklin Trust Company and the checks, drafts and cash deposited in the correspondent banks selected by Franklin Trust Company became as much a part of the deposit account in Franklin as the cash deposited in Franklin itself. This is shown by the fact that the deposits made by appellant in the correspondent banks pursuant to (d) were deposited to the credit of and subject to the check of Franklin Trust Company only; by the fact that such deposits were credited by Franklin Trust Company in the same "deposit account" made up of deposits in the Franklin Trust Company itself by appellant pursuant to (c) of the agreement; and by the fact that the cash funds were to be made available to appellant in the amount credited to appellant in the one "deposit account" including such credit. [R. pp. 31-32, 48.] It follows, therefore, that any trust relationship to be predicated on the deposit of cash in Franklin must apply equally to all the cash, checks and drafts deposited in both Franklin and the correspondent banks, and appellee's argument will be based on that premise. Appellant's other grounds for preference, as to checks deposited in Franklin and the checks, drafts and cash deposited in the correspondent banks, will be considered later.

(a) *The Deposits of Checks, Drafts and Cash by Appellant in the Franklin Trust Company and the Correspondent Banks Gave Rise to a Debtor-Creditor Relationship and Appellant Has Therefore Only a Depositor's Status.*

The funds in which appellant claims a preference were actual deposits; the agreement specifically stated that they were to go into a "Deposit Account". It is fundamental

that deposits made in ordinary course of business create the relation of debtor and creditor between bank and depositor so that upon insolvency of the bank the depositor is entitled only to a pro rata share in its assets along with other claimants of the same class. If this debtor-creditor relationship is not to arise, the depositor must establish that by the terms of the agreement of deposit the bank was not to have the use of the funds but was to hold them in trust for the benefit of the depositor and segregated from its general funds.

> "It is no longer an open question in this court, since the decision in the cases of *Marine Bk. v. Fulton Bk.*, 2 Wall., 252 (69 U. S., XVII., 785), and of *Thompson v. Riggs*, 5 Wall., 663 (72 U. S., XVIII., 704), that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the Bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one and has nothing of the nature of a trust in it."
>
> *The National Bank of the Republic v. Millard*, 177 U. S. 152, 19 L. Ed. 897.

> "We think, ... that it is the necessary effect of the Supreme Court cases cited that the presumption that arises from the very nature of the banking business of a right to use deposited funds in the general business of the bank where there is absent any expressed or clearly implied intention otherwise precludes us from sustaining the conclusion of the court

below that the fund here in question was a special deposit, or became impressed with a trust."

Keyes v. Paducah & I. R. Co., 61 F. (2d) 611.

"Whether a deposit in a bank is general or special depends upon the contract resulting from the mutual understanding and intention of the parties at the time such deposit is made. Fogg v. Tyler, 109 Me. 109, 82 A. 1008, 39 L. R. A. (N. S.) 847, Ann. Cas. 1913E, 41; 3 R. C. L. § 146, p. 517. But a deposit made in the ordinary course of business is presumed to be general, and the burden of proof is upon the depositor to overcome such presumption by proving that the deposit was made upon such terms and conditions as to constitute it a special deposit or a deposit for a specific purpose, as distinguished from a general deposit." (Citing cases.)

Northern Sugar Corp. v. Thompson, 13 F. (2d) 829.

"If money is deposited in a bank for a special purpose, the bank is a trustee or bailee of the money if, but only if, it is the understanding of the parties that the money deposited is not to be used by the bank for its own purposes."

Restatement of the Law of Trusts, § 12, Comment h, p. 46.

See also *Commercial National Bank v. Armstrong*, 148 U. S. 50, 37 L. Ed. 363; *Marine Bank of Chicago v. Fulton County Bank*, 69 U. S. 2, 17 L. Ed. 785; *Thompson v. Riggs*, 72 U. S. 663, 18 L. Ed. 704; 7 C. J. 630; 3 R. C. L. 517; *Morse, Banks and Banking*—Vol. 1, § 186.

Appellant has not established that its agreement with Franklin Trust Company constituted its deposits special rather than general. There is absolutely no language in the agreement providing that the funds deposited were to be held in trust or that they were to be segregated and not

mingled with Franklin's general funds and used by it in its banking business.

Having no express agreement to that effect, appellant seeks to alter the general rule by setting up a number of inferences that Franklin was not to have the use of the funds deposited in the account. Not only are these inferences insufficient in themselves to vary the usual rule that the bank is to have the use of deposits made with it, but they are in point of fact rebutted by the agreement itself.

First, appellant argues that clause (e) of the agreement expressly established under what terms and conditions Franklin Trust Company would be allowed to use the cash entrusted to it. Clause (e) provided that appellant might enter into oral agreements with Franklin Trust Company whereby Franklin Trust Company would be permitted to use the funds deposited pursuant to clauses (c) and (d) of the agreement for certain periods of time, these sums to be called by petitioner's check only, instead of being forwarded by Franklin Trust Company. This clause further provided that under such agreements and no other would said fund ever become subject to check. Appellant argues that since this was a special agreement for Franklin to have the use of the funds at certain times, it could not have had the use of the funds in the absence of such agreement. This is a very weak inference. As a matter of fact such an agreement is perfectly consistent with what was the fact, that Franklin was to have the use of the funds in any event but the operation of clause (e) gave it the use of the funds for a longer period of time. Clause (e) is a straw showing which way the wind blows. That a voluntary agreement might be made permitting the funds to be used for a longer period of time than theretofore permitted is not nearly so

surprising as a voluntary agreement to permit the use of funds which without such agreement must be absolutely segregated. A change of time in the use of a deposit is far different from a change in the character of a deposit. Judge Kirkpatrick in the District Court took the view that clause (e) merely meant that the funds were to be used for a longer period of time. In his opinion (R. 24, 25) he said:

> "The fact that the parties contemplated and actually made subsequent arrangements by which large amounts of money in the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to change the character of the deposit or the relationship created thereby is more than merely suggestive. What could be the purpose of these special arrangements unless it was understood all along that the money on deposit was being used by the Trust Company in its general banking business and it was desired to give them the use of more money for a longer time?"

It follows therefore that any inference from the agreements made under clause (e) that the deposit account was special must fall.

Next, appellant argues that since 2% interest was to be allowed by Franklin on the disbursement account and no interest was to be allowed on the deposit account, it is to be inferred that Franklin was not to have the use of the funds placed in the deposit account. The receipt of interest, however, is not the only method by which a depositor may be compensated for permitting a bank to use his funds. Here, appellant was compensated for permitting the use of these funds by itself obtaining the use of Franklin's banking facilities, by which it was enabled to have made

available to it at its New York office all the collections made by its distributors, not only in Philadelphia but in a number of other cities in Pennsylvania, New Jersey and Delaware. Appellant states on page 36 of its brief that—

> "It is inconceivable that business men of the acumen to require 2 per cent. interest on a checking account would forego interest or money on deposit in another account with the same bank, if they intended the bank to have the same right to use the funds therein."

Appellant fails to consider that banking officials are also supposed to have acumen and that the furnishing of banking facilities in return for the use of funds is the only way that a bank can make money. If it makes too much, the law of supply and demand will necessitate a rebate of part of it by the payment of interest. The fact was that Franklin thought—and agreed—that for what it furnished appellant it was entitled not only to a steady disbursement account upon which it was willing to pay 2% interest until the modified agreement of August, 1930, because it was steady but that, in addition, it should have the use of the funds placed in the deposit account because of the work it was doing. And, since appellant received this consideration —the use of Franklin's facilities—no inference can be drawn from the failure of Franklin to pay interest on this deposit account that it was not to have the use of the funds, especially in view of the fact that the use of them was for very short periods of time. As a matter of fact, every inference is the other way. The attention of the Court is called to Exhibits A and C of plaintiff's bill. (R. pp. 39-42.) These exhibits are two letters written by Franklin to appellant dated June 12, 1925, and August 22,

1925, prior to the time the oral agreement was entered into. In each of these letters Franklin outlined the program: its proposal to collect the deposits in and about Philadelphia for appellant, to deliver weekly payrolls to the appellant's branches, to arrange for deposits to be made by appellant's distributors in correspondent banks selected by Franklin in neighboring towns. In the letter of June 12, after outlining what it proposed to do, Franklin stated (R. p. 40):

> "*In consideration of the above* it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum." [Italics supplied.]

In its letter of August 22nd Franklin likewise stated (R. p. 41):

> "*In consideration of the above* it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies received from your Philadelphia plants and out of town distributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon." [Italics supplied.]

From these two letters it is clear that Franklin considered that it was to have the use of both accounts as consideration for its placing its facilities at appellant's disposal. So far as the Record shows, appellant never made any effort to disabuse Franklin of this thought.

It should be noted that the words "collected" and "collections" as used in those letters refer to the picking up of cash, checks, etc., by representatives of Franklin from the various plants of appellant and not to the "collection" of the checks and drafts from the drawee banks through ordinary banking channels.

Next, appellant argues that no provision of the agreement between the parties suggests that Franklin Trust Company had the right to use these funds except when the parties expressly so agreed. But here the shoe is on the other foot. Appellant was dealing with a bank and it was bound to know that, if it did not wish the bank to make use of the funds in accordance with the universal practice of the banking business, it should have expressly so stipulated. This is hornbook law, as is indicated by reference to the authorities heretofore cited in this brief at pages 36-37. Therefore, since the agreement is silent on the point as to whether Franklin was to have the use of the funds deposited, the only inference that can be drawn is that Franklin was to have such use.

Next, appellant argues that when it did let Franklin use sums for a longer time than usual under clause (e) of the agreement, said sums were to be called by check instead of being forwarded by Franklin to appellant in New York City, whereas, otherwise the account was never subject to check but was to be forwarded to petitioner in New York. From this appellant desires the inference drawn

that cash was to be forwarded and no checking to be allowed, and that therefore the actual cash deposited was to be set aside as trust property and not subject to the usual incidents of a general deposit. This argument can be readily answered. In the first place appellant's inference is itself based upon another untenable inference that cash was actually to be shipped from Philadelphia to New York. See pages 45 ff. *infra*. Moreover, to have provided for checking out these funds would have defeated the purpose of the agreement, which was to use Franklin's facilities so that funds collected in Philadelphia and other towns would be made available to appellant in New York City on a certain day. The question is whose funds were to be made available—Franklin's or appellant's? Every inference and every applicable rule of law show that Franklin was merely giving its general obligation to have funds made available in New York. But in any event, as stated above, the failure to provide for checking privileges has no bearing on the intention of the parties as to the use of the funds. As a matter of fact, any inference from this circumstance would favor the bank because by the agreement it was assured that these funds need not be made available until the following Monday and that it, therefore, had the absolute and safe right to use the funds meanwhile without fear of its account being suddenly checked against by appellant.

Next, appellant argues that since it was not required to maintain an average balance in the so-called "deposit account", while an average balance had to be maintained in the "disbursement account", an inference is to be drawn that Franklin had not contemplated the use of the funds in the deposit account. No such inference can be drawn. Franklin had contemplated the use of the funds in the de-

posit account (see pp. 39-42 *supra*) but it may be presumed that since it would have the use of these funds for such short periods of time and since the amount of the funds in the deposit account was not certain, it was not being adequately compensated for its services unless it was assured that a general average balance would be maintained with it. See "Exhibits A" and "C" [R. pp. 39-41]. It did not matter to Franklin Trust Company whether this average balance existed in the "disbursement account" or in the "deposit account". The main thing was that Franklin be assured a general average balance. The giving of different names to different accounts was done for appellant's convenience and to facilitate its bookkeeping.

Finally, appellant argues that it is not to be inferred that Franklin was to have the use of these funds in the deposit account because it (Franklin) received ample consideration for its services, both in the maintenance of the $25,000 balance in the disbursement account and in the agreement of appellant unde clause (e) to leave large sums on deposit with Franklin in such amount and for such period of time as appellant might feel disposed. From the standpoint of actual consideration, the event proved that there was little that Franklin could count on in the way of acquiring the use of funds for additional periods of time, as provided by clause (e) of the agreement. As a matter of fact, in only five months out of the six years in which the agreement was in effect did appellant leave large sums on deposit with Franklin pursuant to this agreement. [R. p. 34.] All that Franklin could be assured of was the $25,000 general balance in the disbursement account and such sums as might come into the deposit account for very short periods of time. Moreover, it is not for the Court to say on the pleadings just what consideration was sufficient for

Franklin to repay it for its services. Franklin was entitled to the consideration that it bargained for, regardless of amount, and the bargain in this case was made after considerable dickering on both sides, as the exhibits show.

In the last analysis, appellant contends that because it agreed to deposit cash in the Franklin Trust Company and Franklin agreed to provide cash for it in New York, a trust relationship as to that cash is to be implied. To this argument there are two answers:

1. Franklin Trust Company's obligation to furnish funds to appellant in New York City was based on and measured by the amount of the "deposit account" established by clause (c) of the agreement. The amount of this "deposit account" was made up by Franklin's crediting to it (1) the amount of the cash and checks deposited by appellant in Franklin Trust Company itself and (2) the amount of the cash and checks deposited by appellant in the correspondent banks pursuant to clause (d) of the agreement. That the "deposit account" referred to was composed of deposits made in correspondent banks as well as in Franklin is clear even if appellant's version of the facts be taken. On page 4 of its Brief appellant says with respect to the agreement:

> "(c) Franklin Trust Company would accept from petitioner's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to petitioner, or its depository, in New York City; said account to be known as a 'Deposit Account'.
>
> "(d) Franklin Trust Company would select, subject to the approval of petitioner, certain correspondent banks in neighboring towns and cities in New Jersey,

> Delaware and Eastern Pennsylvania, to accept, from distributors of petitioner, cash, drafts and checks to be credited to, and subject to the check of Franklin Trust Company only, but earmarked as the funds of petitioner; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to petitioner in New York City, and . . . *all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above,* for the purpose of Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to petitioner, or its depository, in New York City." (Italics supplied.)

Part of the "deposit account", then, was based on deposits in the correspondent banks, which deposits were credited by those banks to Franklin. There is nothing in the Record, however, to show that Franklin was to receive cash from the correspondent banks and it is to be presumed that the major portion of the deposits in these banks was never paid over to Franklin. Most of them would, in the normal course, be taken care of by the usual method of cancelling mutual credits and debits, only occasional balances between the banks being settled in cash. For the credit it obtained in the correspondent banks, Franklin substituted its own obligation to appellant by crediting the "deposit account". To that extent, the funds furnished by Franklin to appellant in New York were necessarily Franklin's funds and not the funds of appellant. Thus, the picture that appellant would like to present of a simple arrangement of receiving cash in one hand, transferring that cash to another hand and dropping the cash from that

extended hand into a depository in New York is actually non-existent. As far as the deposits in the correspondent banks are concerned, Franklin was obliged to dig into its own pocket to make cash available to appellant in New York in return for the credits which Franklin had received in those banks.

2. Even as to the cash deposited by appellant in Franklin Trust Company itself, the parties never agreed and in fact never contemplated that it would be actually set aside by Franklin and shipped intact to New York. All that was expected—and all that was bargained for—was that Franklin would by the use of the banking facilities of its correspondents in New York make the necessary funds available to appellant in that city. The correspondence between the parties ("Exhibits D" and "E"), written after the agreement was made, clearly shows that appellant knew and acquiesced in Franklin's method of handling the account. These exhibits consist of a letter dated September 9, 1925 written by appellant to Franklin and a reply to that letter dated September 11, 1925 by Franklin to appellant. This letter of appellant to Franklin was in the nature of a complaint because it had not actually received cash in New York on Monday afternoon but had received instead a cashier's check of the First National Bank of New York. [R. p. 43.]

Franklin's letter, Exhibit E, contained an apology for this and informed appellant that it was the fault of the First National Bank of New York, Franklin's New York correspondent in the matter, and that the First National Bank of New York had departed from instructions in not furnishing cash funds. [R. p. 44.]

It is obvious from this correspondence that appellant knew that it was not getting in New York the actual cash deposited in Philadelphia but cash made available to it by Franklin through its New York correspondent and that it was satisfied with the method that Franklin used to perform its obligation provided that cash funds either from Franklin's New York correspondent or from some other source were made available to it in New York at the specified times. This action of Franklin was consistent with the understanding of the parties during the negotiations leading up to the oral agreement. In the letter of August 20, 1925 (R. p. 40B) appellant, after informing Franklin of the accounts to be set up, stated:

> "On Monday of each week it is understood we will receive from you in cash funds the balance of the three deposit accounts as of the close of business the previous Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records."

In its letter of August 22, 1925, Exhibit C (R. p. 41) Franklin stated:

> ". . . All monies received from your Philadelphia plants and out of town distributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, *either through our Federal Reserve correspondent, or through our direct New York correspondent bank,* whichever we conclude to be the most effective for your

purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock, in the afternoon." (Italics supplied.)

These letters show that in these negotiations appellant contemplated that Franklin would use the ordinary banking methods of making funds available to it and, in view of the fact that appellant did not object to these methods, it is evident that it was satisfied with them. The letters written after the agreement was entered into—Exhibits D and E to the Bill—show that appellant did not object to Franklin's using these banking facilities provided, as has been said, Franklin saw to it that cash was made available to it in New York—not the cash formerly owned by appellant but cash whose source was the general funds of the Franklin Trust Company.

Since the Franklin Trust Company and appellant expressly agreed that Franklin was to perform its obligation to appellant by using its own funds, it follows—and, as has been shown, the parties so agreed—that Franklin was not to keep segregated the funds deposited by appellant but was, in accordance with the universal practice of banks, to mingle them with its own funds and use them in its business. It follows further that the relationship between the parties was a contractual and not a fiduciary one. If a depositor wishes to establish a fiduciary relationship between a bank and himself rather than the customary debtor-creditor relationship, he must bargain for the fiduciary relationship by stipulating with the bank that his funds are to be set aside and not to be used by the bank. As Mr. Justice Stone said in his article *Some Legal Problems Involved in the Transmission of Funds,* 21 Columbia Law Review 507, written when he was Dean of Columbia Law School (at pages 513-514):

"When the transaction involves the banker's undertaking to procure the payment at a distant point the customer is often spoken of by bankers and in judicial opinion as having 'purchased' exchange, but it is obvious that the term 'purchase' when applied to such a transaction where the banker does not deliver a bill or draft to the customer is a mere figure of speech and all that the customer has actually purchased is the banker's undertaking or obligation to effect the payment at a distant point. . . . Thus the merchant or traveller who wishes to establish a credit in a foreign country and secures it by payment of money in dollars to his banker, speaks of having purchased pounds sterling, francs, or lire, as the case may be, although all that in fact or in law he has actually secured is some kind of an obligation by the banker to secure credit at the distant point payable in pounds, francs, or lire, as the case may be. Even when the obligation is performed and the credit is established, he is still only the owner of an obligation or *chose in action,* and not of *any actual foreign* money.

"Nor would the customer be justified in supposing that moneys deposited with the bank in order to ensure payment at a distant point would be dealt with by the banker in any different manner than in the case of other moneys deposited with the banker by his general customers. Moneys thus deposited are commingled with the general funds of the banker and dealt with by him as his own funds to be paid out in the course of his banking business which is publicly known and understood to be a business conducted for profit, and in general the customers in dealing with the banker and in the absence of express stipulation deal with him in reliance on his personal credit and not on the presence in the banker's hands of any specific fund to which he may assert a claim. Moreover the difficulties of transacting exchange business by maintaining a segre-

gated fund for each customer until the transaction is completed would be practically insuperable.

"Assuming that the transaction is not the exceptional one of bailment, does the banker who undertakes the transmission of funds in the ordinary course of the banking business become a fiduciary or is he a mere debtor or contractor who undertakes to discharge his debt by payment to a third person? If one bears in mind the elementary principles of banking hereinbefore referred to, which are of universal application, and the established custom of bankers in dealing with funds received in the ordinary course of business, the inference would seem to be irresistible that the undertaking of the banker was not fiduciary but is in the nature of a contractual obligation. The banker being engaged in a business whose very existence depends on the customary and rightful use of funds entrusted to him, as the banker's own, and the universal custom in practice being the use of such funds as the banker's own and their transmission by a system of credits only, the ordinary presumption that funds received for account of another are held in fiduciary capacity should not apply."

It may be conceded that appellant had a particular purpost in mind in making these deposits and that Franklin knew of that purpose. That is not enough. To make Franklin a fiduciary for that purpose, appellant was bound to stipulate, expressly or impliedly, that Franklin act as a fiduciary by segregating the funds to accomplish the purpose; and having failed to so stipulate, it merely acquired Franklin's general obligation to perform, and, consequently, became Franklin's creditor only. The fatal effect of a depositor's failing to stipulate for segregation of his funds and his consequent failure to acquire a cestui que

trust's status even where he made his deposit in the bank for a particular purpose is shown by the recent decision of the United States Supreme Court in *Blakey v. Brinson,* 286 U. S. 254, 76 L. Ed. 1089 (1932).

In that case Brinson had a deposit of $1961.31 in his savings account in the First National Bank of New Bern, North Carolina. On October 10, 1929, an officer of the bank told Brinson that the bank would purchase $4000 worth of United States Bonds for him and asked him to bring to the bank on October 14th such amount in addition to his credit balance as would be required to pay for the bonds. On October 14th Brinson deposited a check for $2100, bringing his deposit balance to more than $4000. Brinson was informed that his bonds had been purchased and his deposit account debited, and that the bonds were held in a bond account. When the bank closely shortly afterward, it was discovered that no bonds had ever been purchased, ordered or received for Brinson. Brinson brought suit against the Receiver of the bank and the district court held that the $4000 necessary to purchase the bonds was held in trust for the purpose of purchasing the bonds and that Brinson should therefore receive a preference over other creditors of the bank. This decision was affirmed by the Circuit Court of Appeals but was reversed by the United States Supreme Court. The Court held that only a debtor-creditor relationship existed between the bank and the depositor and that therefore depositor was entitled to no preference over other claimants upon insolvency. The mere fact that depositor had turned over his funds for a particular purpose, namely, the purchase of bonds, did not give rise to a trust relationship where he did not establish that the bank had undertaken to segregate and use his own funds rather than

to give its general obligation to purchase the bonds with its funds. Said the Court (p. 260):

> "It would have been equally competent for respondent to have provided for the purchase of the bonds either by the creation of a trust of funds in the hands of the bank, to be used for that purpose, or by establishing with it a credit to be debited with the cost of the bonds when purchased. But only if the former was the method adopted could respondent, upon the bank's insolvency and failure to purchase the bonds, recover the fund or its proceeds, if traceable, in preference to general creditors, see Minard v. Watts (C. C.) 186 Fed. 245; Fallgatter v. Citizens' Nat. Bank (D. C.) 11 F. (2d) 383; Northern Sugar Corp. v. Thompson (C. C. A. 8th) 13 F. (2d) 829."

Blakey v. Brinson is remarkably like the instant case not only in principle but also on its facts. In that case the Court saw no justification for turning the chose in action of $1961.31—i. e., the pre-existing deposit—into a specific res by imposing the duty of segregating that amount upon the bank when it received the additional deposit of $2100. from Brinson, which latter deposit was made only for the purpose of purchasing the bonds. The court held that since the $2100. was placed with the bank in the form of a deposit, the inference was that it was in fact a deposit to be added and become part of the former deposit, to make one large chose in action of $4,061.31. As to his earlier deposit, if Brinson wanted a segregation at this late date he should clearly have so specified. Without such segregation, a segregation of the later $2100 would not have advanced his purpose. Therefore, an agreement to segregate, even the $2100 deposited, was not to be inferred merely from the statement of his purpose in making the deposit. As the Court said (p. 261):

> ". . . Respondent obviously did not alter the debit and credit relationship with respect to the $1,961.31 balance by asking the bank to purchase bonds, or by handing to the bank the deposited check of $2,100. All that happened on that date was inconsistent with any purpose to create a trust of the check or its proceeds, and showed unmistakably that the amount of the check, as in the case of any other deposit in the savings account, was to be added to the existing balance and treated like it."

In this respect *Blakey v. Brinson* is remarkably analogous to the present case. It is true that cash was deposited in the Franklin Trust Company with the understanding that cash would be supplied to appellant in New York City but the amount that appellant was to receive in New York on Mondays was, as has been shown, the *total* of the so-called deposit account and this account was made up not only of the cash deposited in the Franklin Trust Company but also of funds deposited in correspondent banks, credit advices of which were sent to Franklin Trust Company. There is absolutely nothing in the Record to show that cash was forwarded to Franklin Trust Company by these correspondent banks. The inference is rather that Franklin Trust Company merely received credits and that balances were adjusted between Franklin Trust Company and these banks only occasionally. Therefore, to the extent that the "deposit account" in Franklin was based on deposits made in the correspondent bank by appellant, it—the "deposit account"—*could not* have been more than a general obligation of Franklin to appellant. For, to create a trust in the account as to such deposits in the correspondent banks Franklin would have had to take its own cash, not deposited by the claimant, and seg-

regate it as a trust res. Nowhere in the agreement is there any suggestion that a segregation of Franklin's own funds to cover such credits in correspondent banks should take place and an obligation to segregate such funds should not be inferred. On the contrary, the inference in the present case, just as it was in *Blakey v. Brinson,* is that the funds actually deposited in Franklin Trust Company were to become its property in exchange for the general obligation of the Franklin Trust Company because the funds actually deposited became, without differentiation, a part of a greater deposit account, part of which—a mere chose in action—could not, for the reasons stated, be anything more than a general obligation of the Franklin Trust Company.

Cases like *Blakey v. Brinson* and the present case arise either because a depositor is ignorant of the functions of the bank or because, if the depositor is aware of its functions, he thinks his particular facts take on a color that sets his deposit apart from the rest of the depositors. It may be that Brinson thought he was creating a trust because he had a particular purpose in mind but since he did not stipulate for a trust and since he turned his funds over to the bank by making use of the usual deposit account, he is bound by the legal effect to be given to such an agreement, namely, that the bank becomes his debtor and he becomes the bank's creditor. Exactly the same thing is true in the present case. The appellant made its deposits with Franklin for six years and never asserted any formal requirement that funds were to be segregated. In fact, there is no evidence that it ever wanted anything except what it got as the result of the agreement made with Franklin, that is, the general obligation of Franklin to make funds available to appellant at the required time. As Justice Holmes said in *Equitable*

Trust Co. v. First National Bank, 275 U. S. 359, 368, 72 L. Ed. 313, 316 (1928):

> "People dealing with large banks do not ordinarily seek the ambiguous security of an identified fund, they are satisfied if the bank gives them credit."

It is only when the bank fails, as in this case, that the depositor fastens on small phrases in the agreement in order to set himself apart from the rest of the depositors when, as a matter of fact, his agreement was actually such that his deposits became the funds of the bank as did the deposits of everyone else except those who could and did stipulate with the bank that it was to hold in trust the moneys placed by them in the bank's custody.

The *Equitable Trust* case, *supra,* like *Blakey v. Brinson,* holds that the failure of a depositor to stipulate that a fund is to be segregated is fatal. That case differs from *Blakey v. Brinson* only in that the purpose of the deposit in the *Equitable Trust* case was for "transmission" of funds, whereas in *Blakey v. Brinson* the purpose of the deposit was to purchase property for the depositor. The facts in the *Equitable Trust* case were as follows:

The subsequently bankrupt firm of Knauth, Nachod & Kuhne had credit with many foreign banks and for a consideration furnished this credit to smaller banks in the United States, as a result of which these small banks could draw directly upon the foreign banks. The terms offered to such banks by the bankrupts were (p. 365):

> "Upon receipt of advice of draft, accompanied by adequate funds payable at par in New York, we shall promptly forward our advice of the same and provide the drawee with funds sufficient for the payment of the draft abroad, by a transfer of credit from our balance,

or otherwise, provided the draft is drawn on a bank named in our latest list of correspondents."

The First National Bank drew a draft on one of the foreign banks, notified the bankrupts that they had sold it, asked them to protect the same on presentation and remitted a check to the bankrupts. The bankrupts on the same day sent to the foreign bank a list of the drafts issued with the request that such drafts be honored by the foreign bank and charged to the bankrupts' account. The foreign bank on receiving this notice debited the account of the bankrupts with it. The understanding between the foreign bank and the bankrupts was that such advices could be canceled at any time and the bankrupts' general account recredited. When the drafts sold were presented to the foreign bank, they were dishonored because Knauth, Nachod & Kuhne had become insolvent. The First National Bank, having been forced to take up the drafts it issued, filed a claim for preference against the assets of the bankrupts upon two theories. It contended first that the sum paid to the bankrupts was paid upon trust for the purpose of being applied to honor the draft. This is in substance the same theory that the appellants have raised here under their third proposition. This contention was dismissed summarily by Mr. Justice Holmes in the following words (p. 366):

"The first of these need not detain us. Beecher v. Cosmopolitan Trust Co., 239 Mass. 48, 131 N. E. 338; Legniti v. Mechanics & Metals Nat. Bank, 230 N. Y. 415, 16 A. L. R. 185, 130 N. E. 597. The identity of the fund was not maintained and no one expected it to be. See National City Bank v. Hotchkiss, 231 U. S. 50, 56, 57, 58 L. ed. 115, 119, 120, 34 Sup. Ct. Rep. 20. The bankrupts undertook to 'forward' advice but only to 'provide' the drawee with funds."

The First National Bank's second contention was that it was, by subrogation, an equitable assignee of the bankrupt firm's account with the foreign bank to the amount of the draft it had issued and to which extent the bankrupt's account with the foreign bank had been debited. This argument was rejected by the Supreme Court. The Court said that the First National Bank might have bargained for a fund to be set apart for it in the foreign bank but it had not done so expressly and the general effect of the agreement was that it was merely bargaining for the obligation of Knauth, Nachod & Kuhne to have made available at the required time the necessary credit in the foreign bank. Said the Court (p. 366):

> "People dealing with large banks do not ordinarily seek the ambiguous security of an identified fund, they are satisfied if the bank gives them credit. We see no indications that the Trinidad bank was not perfectly content to know that it would have credit with the Banca Commerciale, and that in the usual course of things its drafts would be paid. Evidently with this conception of their duties the bankrupts asked the Italian bank 'to protect to the debit of our account the drafts' in question and others, and the branch bank to 'honor the above listed drafts.' . . .
>
> "The decision of this case depends more upon the general import of the transaction and upon what the parties were likely to want than upon the phrases that can be picked out from the several steps. We repeat that in our opinion what the parties meant to establish and what the respondent got was the assurance of a credit abroad to the extent of its check as in the case of a letter of credit, not an attenuated property right in an account to which no special funds were attached and the particulars of which neither the respondent nor the purchaser of the check could know."

The second part of the opinion of the Court in the Equitable Trust case is especially interesting. One of appellant's arguments is that it was an equitable assignee of the cash deposited in Franklin. The foregoing case shows that an equitable assignment can arise only where the depositor expressly stipulates for a fund to be set aside. In the present case the appellant did not so stipulate. Since it failed to do so, there is no fund upon which an equitable assignment can operate and, therefore, this theory can no more sustain it than any of the other three advanced by it in seeking a preference.

Blakey v. Brinson establishes that a deposit with a bank for a particular purpose does not create a trust where the depositor fails to stipulate that the funds are to be segregated, and *First National Bank v. Equitable Trust Co.* establishes that this is true even though the particular purpose involves making funds available to the depositor at a distant point.

Other cases to the same effect are:

Great Atlantic and Pacific Tea Company v. Citizens National Bank, 66 F. (2) 883 (C. C. A. 3d 1933);

Commercial National Bank v. Armstrong, 148 U. S. 50, 37 L. Ed. 363;

Keyes v. Paducah & I. R. Co., 61 F. (2d) 611, (C. C. A. 6th 1932);

Northern Sugar Corporation v. Thompson, 13 F. (2d) 829 (C. C. A. 8th 1926);

Santee Timber Corporation v. Elliott, 70 F. (2d) 179 (C. C. A. 4th 1934);

Kurecki v. Buck, 71 F. (2d) 227 (C. C. A. 7th 1934).

Of these cases the first two are important in that they likewise establish that the mere fact that the purpose for which the deposit is made is the transmission of funds from one point to another will not, without more, give rise to a fiduciary relationship rather than the usual debtor-creditor one; and they also establish that the mere fact that the funds deposited are to be held by the bank for a very short period of time will not, without more, give rise to any more than a debtor-creditor relationship. These cases are important because appellant in asserting a trust relationship in the present case relies chiefly on the fact that the funds deposited by it were to be transferred, and also that they were to be transferred very quickly.

Great Atlantic & Pacific Tea Company v. Citizens National Bank, 66 F. (2d) 883, C. C. A. 3 (1933), closely parallels the instant case. As did appellant, the Atlantic and Pacific Tea Company desired to have its funds transferred from its stores in different cities to the City of Pittsburgh. The tea company entered into an agreement with the bank whereby $2,000. was placed on deposit as an open dormant balance which was not to be disturbed without written notice. The agreement further provided (p. 883):

> "Deposits will be made daily by our representatives who will leave with you, two copies of the form showing the amount deposited. One of these forms should be verified by your Teller, or proper officer, and attached to your draft, which will be mailed the same day to the First National Bank at Pittsburgh. The other copy will be retained for your records. A tissue copy will remain in the Manager's book which you are requested to verify also. . . ."

It was customary for the managers of the company's stores to accompany their daily deposits in the bank with a ticket in the following form:

"Citizens' National Bank
(Name of Bank)
at
Andergrift, Pa.

accepts the amount listed below for immediate transfer to the First National Bank at Pittsburgh, Pa., for the account of The Great Atlantic & Pacific Tea Company in accordance with agreement in effect.

Currency	$254.00
Silver	36.00
Checks—List below	
	6.00
	23.44
	1.15
	12.25
Total	332.84"

In accordance with the agreement and without the objection of the tea company the bank remitted to the Pittsburgh bank the amount of the daily deposits by drawing drafts on one of its correspondents payable to the Pittsburgh bank for deposit to the credit of the tea company. After the close of the bank's business on Saturday, October 3rd, certain deposits were made which were never paid over to the tea company because the bank closed on October 5, 1931. The tea company brought suit against the Receiver of the bank contending that it was entitled to a preference in these deposits. The court held that no preference should be granted as no trust was created, the bank's obligation to transmit being purely contractual. Said the court (p. 884):

> "The agreement of the parties is, of course, for the transmission of the company's money from its stores to one of its central depositories. The agreement is not ambiguous. It contemplates daily deposits of the

company's funds in the bank and the transmission of the accumulated deposits of the day at the close of business to a distant bank. The method of transmitting the funds is by the bank's draft. Whenever the company made a deposit in the bank, the funds were mingled with the common mass of the bank's money, to be used as the bank would choose. There was no stipulation nor expectation that the deposits were to be set apart as a trust fund and held as such for the depositor; in other words, the company purchased the credit of the bank. There is no question but that is what the agreement means, for it says so in so many words, and the necessary conclusion is that the obligation of the bank here is purely contractual. In re A. Bolognesi & Company, 254 F. 770 (C. C. A. 2); Equitable Trust Company of N. Y., etc., v. First National Bank, etc., 275 U. S. 359, 48 S. Ct. 167, 72 L. Ed. 313; Stone, Some Legal Problems Involved in the Transmission of Funds, 21 Col. L. R. 507, 514."

The tea company also contended that there was a constructive trust in the deposit because the bank's officers knew at the time it accepted the deposit that the bank was insolvent. The court held that since at the time the deposits were accepted the bank was not hopelessly insolvent but actually had the honest hope of avoiding the inevitable, under the usual rule it was not guilty in taking the deposit and therefore no constructive trust arose.

The decision on this latter point is illuminating in the light of appellant's contention here in the last pages of its brief that the Franklin Trust Company was guilty of fraud in taking the deposits on October 2nd and 3rd as the bank's officers presumably knew it was insolvent. There is nothing in the record to show that the bank was insolvent on October 5, 1931, when it closed. The only allegation is that it

was taken into possession by the Secretary of Banking but no presumption of insolvency can be drawn from that fact alone as under the Banking Act of 1923 the Secretary of Banking may take possession of the business or property of a bank for any one of nine reasons, most of which do not involve insolvency. (See Appendix page 83.) Moreover, even if the bank were insolvent, there is nothing in the record to show that its officers knew that it was hopelessly insolvent or even that they knew that it was insolvent at all. Therefore there is nothing from which the court could infer that the bank in accepting the deposit was guilty of fraud upon the appellant.

In *Commercial National Bank v. Armstrong, supra,* the Commercial National Bank of Philadelphia (hereafter called "Commercial") brought suit against Armstrong as Receiver of the Fidelity National Bank of Cincinnati (hereafter called "Fidelity") alleging that he held certain moneys received as receiver in trust for Commercial. The Fidelity had entered into an agreement with the Commercial whereby Fidelity was to collect items for the Commercial "at par all points west of Pennsylvania and remit the 1st, 11th, and 21st of each month". The items sent to Fidelity under this agreement were endorsed for collection for the Commercial. On June 20, 1887, Fidelity failed, having in its hands or in the hands of other banks to which the same had been sent by it for collection proceeds of paper forwarded it by plaintiff amounting to $16,851.92. It was in these proceeds that Commercial claimed a preference. The Supreme Court held that while the Fidelity was the agent of Commercial before collection, it became the debtor after collection, but it held that collection did not occur for the purpose of changing the agency relationship to one of debtor-creditor unless and until Fidelity either received the

funds from its correspondent banks or what was equivalent to the receiving, had its indebtedness to its correspondent banks canceled by use of the proceeds prior to its failure. In holding that the Fidelity became a debtor of Commercial after collection, the court said that this was based upon the custom of banks to make use of the funds after collection in the absence of a stipulation to the contrary and the court felt that the fact that it had the use of the funds for only a very short time would not alter the rule. Said the court (p. 367):

> ". . . by the terms of the arrangement between the plaintiff and the Fidelity the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit the first, eleventh and twenty-first of each month. Collections intermediate those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Fidelity and used in its business. *The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting.* The very fact that collections were to be made at par shows that the compensation for the trouble and expense of collection was understood to be the temporary deposit of the funds thus collected and the temporary use thereof by the Fidelity. . . .
>
> ". . . Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity during the intervals between the days of remitting were to be made special deposits,

but on the contrary it is clear that they intended that the moneys thus received should pass into the general funds of the bank and be used by it as other funds, and that when the day for remitting came the remittance should be made out of such general funds." (Italics supplied.)

The following cases are also interesting in that they establish that a deposit of money for a particular purpose does not give rise to a trust relationship where the depositor fails to stipulate that the bank is not to have the use of the funds.

In *Keyes v. Paducah & I. R. Co.*, 61 F. (2d) 611 (C. C. A. 6th 1932), funds were deposited in the National Bank of Kentucky on an order of the court pending the outcome of litigation between a taxpayer and the county to determine whether certain taxes were due. A draft for $8000. was deposited by the railroad taxpayer for which a receipt was given by the bank. After the bank had collected the draft it advised the railroad's counsel as follows (p. 612):

"Acknowledging receipt of your letter of the 12th, beg to advise that the draft for Eight Thousand Dollars which you left with this bank for collection has been paid, and we are holding the proceeds in form of a cashier's check awaiting the time when your treasurer will, as you suggested in your letter, take the matter up with us.

"The court order accompanying your letter in the case of Paducah & Illinois Railroad Company, plaintiff, v. Holt, Sheriff, et al., defendant, has been filed for future reference."

Some months before the suit was ended the bank failed and thereafter when the court finally held that the railroad need not pay the tax in question the railroad brought suit

for full payment of the amount deposited. After a full discussion of general and special deposits the court held that the deposit in question was a general one and that the depositor was entitled to no preference. Said the court (p. 613):

> "Whether a deposit in a bank is general or special depends upon the mutual understanding, and intention of the parties at the time such deposit is made, and a deposit made in the ordinary course of business is presumed to be general, and the burden of proof is upon the depositor to overcome such presumption by proving that the deposit was made upon such terms and conditions as constituted a special deposit, or a deposit for a specific purpose, as distinguished from a general deposit. Northern Sugar Corp. v. Thompson (C. C. A.) 13 F. (2d) 829.
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> "Having in mind the nature of a special deposit, the trust relationship that results, and the initial presumption against its existence, it becomes necessary to determine what kind of a deposit was made in the instant case. If the deposit was special, its character must be derived from the terms of the court order directing it, the receipt given by the bank, and the bank's letter acknowledging payment of the draft. There is no other evidence. We fail to find in any of these instruments, herein sufficiently recited, any indication that it was the intention of the court or of the parties that the avails of the draft were to be segregated and kept as a separate fund until its disposition was directed by an order of the court. There was certainly no express direction in the order of the court to keep the funds deposited separate and distinct from the general funds of the bank, nor is any such direction to be clearly implied. That the parties did not themselves so interpret the arrangement seems equally clear. The bank's letter of June 15, 1929, informed the depositor

that the bank was holding the proceeds of the deposited draft in the form of a cashier's check. This could have but one meaning, and that is that the funds received were held as part of the general funds of the bank, and were represented by the bank's check upon itself, to be delivered to the successful litigant upon the order of the court. Although this letter was received by the depositor seventeen months before the determination of the litigation, and fifteen months before the bank failed, it does not appear that any protest was made to the bank's method of handling the fund, nor was a contrary understanding expressed by the depositor.

It would of course have been competent for the court, or for the parties, to have created a trust fund awaiting the outcome of the litigation. While there is no exclusive formula recognized by the law to accomplish such purpose, the inclusion of apt words of direction in the court order, in the instructions of the depositor to the bank, or in the form of receipt demanded, could very easily have brought it about. As was said by the Supreme Court in the recent case of Blakey v. Brinson, 286 U. S. 254, 52 S. Ct. 516, 517, 76 L. Ed. 1089: 'It would have been equally competent for respondent to have provided for the purchase of the bonds either by the creation of a trust of funds in the hands of the bank, to be used for that purpose, or by establishing with it a credit to be debited with the cost of the bonds when purchased. But only if the former was the method adopted could respondent, upon the bank's insolvency and failure to purchase the bonds, recover the fund or its proceeds, if traceable, in preference to general creditors.' ''

In *Northern Sugar Corp. v. Thompson,* 13 F. (2d) 829 (C. C. A. 8th 1926), plaintiff, a sugar corporation, opened an account in the Wells National Bank for the purpose of making payment to farmers for beets purchased. Plaintiff

arranged to deposit with the bank a fund equal to the total amount of the payroll and would disburse the same by checks payable to the farmers, the checks to be lithographed with the words "Beet Payroll". When these particular funds were deposited, the bank was asked to place them to the credit of the "Beet Payroll Account." When the bank failed, there was some $29,000. in this account and the plaintiff sought to obtain a preference on the theory that the fund was held in trust. The court held that the plaintiff was entitled only to a depositor's status. Although the plaintiff had a particular purpose in mind in making the deposit, the court could find no agreement between the plaintiff and the bank that the funds

> "deposited to cover payroll checks should be held by the bank as a special fund, separate and apart from other general funds of the bank, or that they should be treated by the bank in any way different from a general deposit."

The Court said further (p. 832):

> "It is not an uncommon practice today for the large corporate organizations to carry several different accounts in the same bank. These accounts might be properly called departmental accounts. In such accounts funds are deposited, and checked out to pay the obligations of a particular department. Thus, in a sense, these deposits are made for the purpose of paying a particular class of obligations. But it is not the intention of the parties that the bank in accepting such deposits, shall act as the agent of the corporation, but such deposits are intended to be general deposits. The purpose of the corporation in carrying such separate accounts is not to reserve title to the deposits in itself, but to keep the transactions of its several departments separate from each other, and to facilitate the keeping of its books and records."

It has been shown that appellant agreed that Franklin Trust Company was not to segregate its deposits but was to mingle appellant's funds with its own and to perform its obligation to make funds available to appellant in New York City by using its (Franklin's) own funds or its credit with its New York correspondents. It follows from the cases cited above that no trust or fiduciary relationship existed between Franklin and appellant but only the usual debtor-creditor relationship and appellant therefore is entitled to no preference in the assets of Franklin Trust Company but must share pro rata with its general depositors.

(1) *Appellant's Four Theories as to the Creation of a Trust or Fiduciary Relationship Are Inapplicable to the Facts of This Case.*

Notwithstanding the authorities set forth above appellant argues that a fiduciary relationship existed between it and Franklin Trust Company with respect to the deposit in the Franklin and sets forth four legal theories upon which the assertion of fiduciary relationship might be based, with the consequent allowance of preference. Appellant's four theories are as follows:

> "(1) acceptance of money from one person for delivery to another constitutes the taker a trustee; (2) acceptance by a bank of a deposit for a particular purpose makes the bank a trustee; (3) acceptance by a bank from a customer of a deposit for the purpose of purchasing cash for the customer in another city constitutes the bank a trustee; and (4) equity regards as done that which ought to have been done."

In view of the fact that Franklin Trust Company had the right to use the funds in question, no fiduciary relation-

ship arose between it and appellant. Consequently not one of appellant's four theories and none of the authorities cited by it has any application to the facts of this case.

Appellant's first theory, that the "acceptance of money from one person for delivery to another constitutes the taker a trustee for the latter" is not in point.

1. No money was to be delivered from one person to another. The deposits in Philadelphia were made by appellant and the funds in New York were delivered to appellant.

2. As has been stated, a large part of the money to be delivered in New York consisted not of money received by Franklin Trust Company from appellant but of money actually derived from Franklin's own general funds as a result of money deposited in other banks by appellant, and for which Franklin received not cash but merely a credit on the other bank.

3. In any event, since the decision of the Supreme Court in *Equitable Trust Company v. First National Bank, supra,* a mere agreement by a bank to make funds available in another city as a result of a deposit made with it in one city does not give rise to any trust or fiduciary relationship unless the depositor stipulates that the deposit is to be segregated and maintained in identifiable condition. This theory contemplates relations between individuals and not relations with banks in the absence of a special agreement for segregation of the funds. For this reason, *McKee v. Lamon,* 159 U. S. 317 (1895), cited by appellant, is not in point, because no bank was involved, and therefore the presumption that the bank is to have the use of the funds deposited and furnish its general obligation

did not arise. The other cases under this section deal with escrow agreements and other situations having no relation to this case, and throwing no light upon it. Appellant's purpose in citing these cases seems to be to show that the custom of banks using funds deposited with them is not established as part of the agreement in this case, because not properly pleaded. This custom is so universal that a rule of law has been established that a bank of deposit has the right to use funds deposited with it and the burden is on the depositor to establish that the right to use the funds on the part of the bank was taken away by the agreement.

For its second legal proposition that "acceptance by a bank of deposits for a specific designated or particular purpose constitutes the bank a trustee thereof until the purpose is accomplished", appellant cites a wealth of authority. *Blakey v. Brinson, supra,* however, clearly establishes that irrespective of the purpose for which a deposit is made, a trust or fiduciary relationship does not arise between the bank and the depositor unless the depositor by agreement avoids the customary effect of a deposit, that is, that the depositor is merely a creditor and has the bank's general obligation to carry out the purpose for which the deposit is made. The burden is on the depositor to show that he had an understanding with the bank that the particular deposit was not to be used but was to be segregated to be used in specie for the purpose for which it was deposited.

The decision in *Blakey v. Brinson* confirms the rule as laid down in the Restatement of the Law of Trusts of the American Law Institute, which in Section 12, Comment (h) provides:

> "If money is deposited in a bank for a special purpose, the bank is a trustee or bailee of the money if, but

only if, it is the understanding of the parties that the money deposited is not to be used by the bank for its own purposes."

The authorities set forth earlier in appellee's brief at pages 51-68, are so clear that it would be profitless to dissect the eighteen cases cited by appellant on pages 43-53 of its brief. Most of them are not in point for obvious reasons. Thus in some of them (e. g., *Libby v. Hopkins,* 104 U. S. 303 (1881), and *Vosburgh's Estate,* 279 Pa. 329 (1924), the alleged fiduciary was not a bank, so that the presumption applicable to the present case, that a bank is to have a right to use the funds in the absence of an agreement to the contrary, was not involved. In other cases (e. g., *Merchants National Bank v. School District,* 94 F. 705, C. C. A. 9 (1899); *Smith v. Motley,* 150 F. 266, C. C. A. 6 (1906); *Girard Avenue Title and Trust Company Case,* 317 Pa. 313 (1935)) the facts gave rise to a trust *ex maleficio,* and they therefore have no application to this case. In certain other cases it was clear that the bank was to hold the funds as agent. And to the extent that any of such cases are used as general authority for the proposition that a deposit for a specific purpose, without more, gives rise to a fiduciary relationship, they must yield to the rule as established in *Blakey v. Brinson* and *Equitable Trust Company v. First National Bank,* that irrespective of the purpose, the only question to be answered in deciding whether or not a deposit gives rise to a fiduciary relationship is whether the depositor had a specific understanding with the bank that the depositor's funds were to be segregated until the purpose was accomplished. If the bank is to have the right to use the funds and furnish its obligation for the purpose, then no fiduciary relationship arises.

Appellant's third theory, that "acceptance by a bank from a customer of a deposit for the purpose of purchasing cash for the customer in another city, constitutes the bank a trustee", is not in point. Appellant was not purchasing cash but was merely acquiring Franklin Trust Company's obligation to have funds available to it in New York City. The language of Justice Stone in his article in Columbia Law Review, already quoted on pages 49-50, *supra,* is pertinent here.

The cases that appellant cites under this sub-heading are cases that might just as well have been put under its Subdivision (1) or (2). They involve the use of a bank by a depositor to make funds available to it at a distant point. Without discussing these cases in detail, appellee submits that the rule of *Equitable Trust Company v. First National Bank,* p. 56, *supra,* is clear that the mere agreement by a bank to make funds available to a depositor at another point does not give rise to a trust relationship where the bank has not agreed to set aside the fund deposited with it.

As to its fourth legal theory, appellant contends that—

> "Under the maxim, equity regards as done that which ought to have been done, there was an equitable assignment of the cash to petitioner."

This argument has already been disposed of by appellee in its discussion of *Equitable Trust Company v. First National Bank,* at pages 57-58 of this brief. It will suffice here to say that a transaction cannot give rise to an equitable assignment in favor of a depositor unless he can point to a specific fund which the bank has agreed to set aside. There was no such fund in this case, in view of the fact that Franklin Trust Company had the right to use

funds deposited with it, and merely gave its obligation to make funds available at the required times. In the two cases cited by appellant, *Early & Daniel Co. v. Pearson,* 36 F. (2d) 732 (C. C. A. 5th, 1929), and *Fourth Street Bank v. Yardley,* 165 U. S. 634, 41 L. ed. 855, 17 S. Ct. 439 (1897), there was a specific fund or credit which the bank had set aside for the benefit of the plaintiffs and to which they accordingly had the right to look when the bank failed.

In conclusion it is submitted that appellant's four theories can be combined into one theory, namely, that a deposit designated to be special and in trust and not to be used by the bank of deposit can be claimed in full upon insolvency of the bank. If appellant could establish such an agreement with the Franklin Trust Company with regard to its deposit it might succeed on some one or more of the four theories it advanced and it would seem immaterial which one the Court selected. Appellant, however, has not proved that the deposit made was to be in trust; rather the agreement shows that the usual custom was to prevail and that the bank was to have the use of the funds and furnish only its general obligation to make payments at the time and place specified. Since that is the case, appellant is in no better position than any other depositor and must share pro rata with other claimants of the same class.

(*b*) *Appellant Is Entitled to No Preference in the Proceeds of Drafts and Checks Deposited With Franklin Trust Company and Collected After It Was Taken Over by Appellee.*

Apart from any question of establishing a trust in the deposits, appellant contends that it is entitled to a prefer-

ence in certain checks and drafts amounting to $8,747.66, which had not been collected at the time Franklin closed on October 5, 1931. This contention is made under the *Pennsylvania Bank Collection Act of June 13, 1931,* P. L. 568, which for certain purposes makes the bank of deposit and other collecting banks the agent of a depositor of commercial paper.

Under the federal rule, title to checks and drafts indorsed without restriction passes to the bank of deposit at the time of deposit, and the depositor thereafter becomes a creditor of the bank, even prior to collection. *City of Douglas v. Federal Reserve Bank,* 271 U. S. 489; 70 L. Ed. 1051. There is nothing in the record to show that these checks were indorsed restrictively, and, apart from the Pennsylvania statute above-mentioned, appellant has failed to show that the federal rule would not be applicable to the deposits of checks and drafts made by it.

It may be conceded that to the extent the foregoing statute is applicable, the federal rule must yield to it. It is appellee's contention, however, that by its terms that statute is not applicable to this case. For it provides in Section 2 that "*except as otherwise provided by agreement* . . . the bank of deposit shall be agent of the depositor for its collection . . ." (Italics supplied.) The effect of the agreement entered into in 1925, between Franklin Trust Company and appellant, long before this Bank Collection Act was enacted, was to place the deposit of checks and drafts in the same category as the deposits of cash so that immediately upon deposit appellant acquired a general claim against Franklin Trust Company by reason of the deposit. Appellant's bill of complaint recites that one subdivision of the agreement was that (R. pp. 31-32):

"(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to your orator, or its depository, in New York City; said account to be known as a 'Deposit Account'."

This averment does indicate that the deposit of drafts and checks was differentiated from the deposit of cash as it speaks of the drafts and checks being accepted "for collection". As pointed out in appellee's counter-statement of the case, however, this particular averment cannot be divorced from the corresponding averment in appellee's answer. This answer does not admit that the drafts and checks were accepted for collection. Rather, it shows that checks, drafts and cash were all received to make one deposit account. Appellee's averment on this point reads as follows (R. p. 48):

(c) "As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository."

Appellee's qualification of appellant's averment on this point is based upon the exhibits attached to appellant's bill. The oral agreement of August 25, 1925, was merely a consummation of the negotiations between the parties, as shown by these Exhibits A, B and C. (R. pp. 39-42.) An examination of these exhibits shows that at no point did either Franklin or appellant consider the deposit of checks and drafts in any different light from the deposit of cash. In speaking of this deposit account, both appellant and Franklin Trust Company speak only of the "moneys" to be deposited to appellant's credit in the deposit account. It is submitted that the use of this word "moneys" establishes that the deposits made by appellant were to go to its general credit immediately and that this was true whether the deposits were checks, drafts or cash. This was the view taken by Judge Kirkpatrick, of the District Court, who said in his opinion (R. p. 24):

> "Even if the averment of the bill that the deposits were received 'for collection' in the ordinary commercial sense could be taken as admitted (which is doubtful in view of the qualified answer) it would make little difference, since it is conceded that cash, drafts and checks were all to go into the deposit account indiscriminately under the same terms and of course it would be patently absurd to speak of accepting cash deposit for collection."

Appellee therefore respectfully submits that appellant has failed to establish that the uncollected checks and drafts were deposited for collection within the meaning of the provisions of the Pennsylvania Bank Collection Act and that both the District Court and the Circuit Court of Appeals correctly held that appellant was entitled to no preference in their proceeds.

(c) *Appellant Is Entitled to No Preference in the Cash, Checks and Drafts Deposited in the Correspondent Banks and Received by Appellee After the Franklin Trust Company Closed.*

Apart from any question of establishing a trust, appellant asserts a preference in the cash, drafts and checks in the amount of $32,403.26, which had been deposited with the correspondent banks of Franklin pursuant to the agreement of August 25, 1925. Appellant bases this claim for preference on the fact that Franklin Trust Company had not received any notice of these deposits prior to its closing and the further fact that the funds deposited never came into the possession of Franklin but were received by appellee to be put into escrow pending the outcome of this litigation.

The fact that Franklin Trust Company had not received notice of the deposits made in its correspondent banks prior to collection, and never actually received the funds deposited, is immaterial. Appellee has shown earlier in this brief that no trust relationship existed between Franklin Trust Company and appellant as to deposits made in correspondent banks, any more than it did as to deposits made in Franklin Trust Company itself. The effect of all the deposits was to create a debtor-creditor relationship between Franklin Trust Company and appellant, and this relationship arose immediately upon deposit. That the deposits in correspondent banks immediately became Franklin's general obligation is shown by the fact that such deposits were credited to Franklin's account in those banks and subject to Franklin's check only, and that Franklin undertook to make these amounts good to appellant in New York City. The effect of the agreement was to make a deposit in a correspondent bank actually and im-

mediately equivalent to a deposit in Franklin Trust Company. It is true that Franklin forwarded funds equivalent to these deposits in correspondent banks only after it had received advices of the same from those banks, but the purpose of the advices was not to give rise to Franklin's obligation but merely to inform it as to its extent at any given time. By the agreement Franklin was bound to use its funds to produce in New York the equivalent of deposits made in the correspondent banks, but it had to receive the advices in order to know exactly what amount it was to send. Consequently since Franklin's obligation arose as soon as the deposit was made, the fact that it never received the funds nor received notice of the deposits is immaterial. The obligation, not the possession, is the important thing, and since appellant was entitled to and received Franklin's obligation immediately for these deposits, it is entitled to no preference in them.

The sole authority relied upon by appellant for its claim to a preference in these deposits in the correspondent banks is *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 37 L. Ed. 363 (1893). That case is not in point. There the Fidelity Bank in Cleveland agreed to collect commercial paper in the west for the Commercial Bank of Pennsylvania, located in Philadelphia, and to remit "on the 1st, 11th and 21st of each month". The paper forwarded for collection was stamped: "Pay Fidelity National Bank of Cincinnati, O., or order, for collection for Commercial Bank of Philadelphia, Pa., E. P. Graham, cashier." In commenting on the agreement this Court said (p. 56): "The Fidelity received the paper as agent, and the indorsement 'for collection' was notice that its possession was that of agent and not of owner." In setting forth this case, appellant states that these collections were to be

made "in consideration of the temporary use of the funds". As a matter of fact, there was no express agreement between the banks that Fidelity was to have the use of the funds any more than there was in the present case. The only agreement the Court had to construe was the agreement to collect and remit. While some of the commercial paper was in the process of collection, the Fidelity Bank failed and Commercial Bank asserted a preference in the proceeds of these collections. These proceeds at the time of Fidelity's failure were in the hands of sub-agent banks to which Fidelity had forwarded them for collection. In determining whether and to what extent the Commercial Bank should obtain a preference in these proceeds, the Court used two legal premises. First, it said that the effect of the agreement was to make Fidelity an agent of Commercial before collection, and, by custom, a debtor of Commercial after collection. The Court then went on to decide just when such commercial paper was collected, and it held that in those instances where the proceeds collected by the sub-agent banks had been used by them to cancel indebtedness of Fidelity Bank to them, Fidelity had collected and thereupon became a debtor of Commercial and the latter was entitled to no preference. In those instances, however, in which the proceeds were still in other collecting banks and had neither been forwarded to Fidelity nor used to cancel an indebtedness of Fidelity, the Court held such paper had not been collected, even though a notice had been sent to Fidelity of such collection, that the agency relationship between Fidelity and Commercial still existed, and that therefore Commercial was entitled to a preference in such proceeds.

That case is not in point here, because all it decided and all it purported to decide was at what point an agency relationship which admittedly existed between two banks

was transformed into a debtor-creditor relationship between those banks. Such a decision has no bearing on a case like the instant one, in which no agency or fiduciary relationship ever existed between Franklin Trust Company and appellant, but which amounted to a debtor-creditor relationship from the start. There is no evidence on the present record that checks were deposited in the correspondent banks "for collection" and as pointed out by Judge Kirkpatrick in his opinion in the lower court (R. p. 24): "It would be patently absurd to speak of accepting cash deposit for collection." Accordingly no agency relationship ever arose, either as to the cash or checks deposited in the correspondent banks. The parties having agreed that the relationship between Franklin Trust Company and appellant was, as to these deposits in correspondent banks, to be a debtor-creditor relationship immediately, questions as to when notice was received by Franklin from these banks, or when funds were transmitted from these banks, are immaterial, and a decision like *Commercial Bank v. Armstrong*, which uses these criteria in determining when a transition from an agency relationship into a debtor-creditor relationship occurs, has no bearing on our problem. Moreover the deposits in the correspondent banks were made to the credit of Franklin and were subject to its check alone. By the act of deposit appellant lost all interest in the funds as such and accepted in lieu thereof the general obligation of Franklin to pay appellant in New York in cash funds the following Monday the total amount of the deposits in Franklin and the correspondent banks. It is therefore submitted that appellant has failed to establish its claim to a preference in the deposits of $32,403.26 made by it to the credit of Franklin Trust Company in the correspondent banks and that the District Court and Circuit Court of Appeals properly so ruled.

(*d*) *Summary of Argument on the Merits.*

The District Court and the Circuit Court of Appeals both correctly held that appellant was entitled to no preference with respect to the deposits made by it in the Franklin Trust Company and the correspondent banks, and properly dismissed appellant's bill on the merits. Appellant is entitled to no preference as to the $40,842.51 of cash deposited in the Franklin Trust Company, in the $8,747.66 checks and drafts deposited in Franklin Trust Company, nor in the $32,403.26 total of cash, checks and drafts deposited in the correspondent banks of Franklin Trust Company, because the agreement between Franklin Trust Company and appellant was such that the deposits both of checks and cash gave title thereto to Franklin and gave rise to a debtor-creditor relationship and not to a trust relationship between Franklin Trust Company and appellant, and gave rise to such debtor-creditor relationship immediately upon deposit.

It is therefore submitted that the decree of the Circuit Court of Appeals for the Third Circuit entered on June 14, 1933, directing the District Court for the Eastern District of Pennsylvania to dismiss appellant's bill should be affirmed.

Respectfully submitted,

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Appendix.

THE RELEVANT SECTION OF THE PENNSYLVANIA BANKING ACT OF 1923, JUNE 15, P. L. 809, AS AMENDED BY ACT OF 1927, MAY 5, P. L. 762.

§ 19. Jurisdiction of courts

Whenever it shall become the right or duty of the Attorney General to proceed against any corporation or person under the supervision of the department, pursuant to the provisions of this act, he may, in his discretion, proceed either in the court of common pleas of Dauphin County or in the court of common pleas of the county where the banking house or other place of business of such corporation or person is located. (1923, June 15, P. L. 809, § 19.)

§ 21. Power of secretary to take possession

The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary, a deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined upon oath or affirmation, regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person.

The secretary may, in like manner, take possession of the business and property of any private or unincorporated bank, or the estate of any private banker, otherwise exempt from the supervision of the department, whenever such private or unincorporated bank shall have made an assignment for the benefit of creditors, or for any of the causes mentioned hereinbefore in this section. (1923, June 15, P. L. 809, § 21; 1927, May 5, P. L. 762, § 7.)

§ 22. Certificate of taking possession

When the secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act,[1] he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who

[1] Section 21 of this title, ante.

shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

Such superseded receiver, assignee, or trustee shall forthwith file his account in the court having jurisdiction thereof, and pay over and deliver to the secretary all moneys, securities, assets, and property of such corporation or person in his custody, possession, or control. Said court shall allow credit for expenses and for the disbursements properly incurred or made prior to the taking possession by the secretary, and shall allow proper compensation to said receiver, assignee, or trustee, and his counsel, which, when determined, shall be paid out of the funds of said corporation or person in the hands of the secretary. (1923, June 15, P. L. 809, § 22.)

§ 23. Injunction to restrain secretary

Whenever the secretary takes possession of the property and business of any corporation or person, such corporation or person may, at any time within ten days, apply to the court for an order requiring the secretary to show cause why he should not be enjoined from continuing such possession. The secretary may be served personally wherever found within the State, or by leaving a copy with the deputy in charge of his office, or by serving the special deputy appointed by him in such proceeding. At the hearing, a copy, certified by the secretary or one of his deputies, of any report of a duly instituted examination of such corporation or person shall be prima facie evidence of the facts therein stated; and if, from such report or reports or other evidence, there shall appear to be just cause for the taking and continuing of possession by the secretary, he shall not be enjoined, unless such report or reports or other evidence

shall be overcome by proper proof produced by such corporation or person, in which event the court shall direct the secretary to refrain from further proceedings and to surrender such possession. (1923, June 15, P. L. 809, § 23; 1927, May 5, P. L. 762, § 8.)

§ 25. Notice to parties holding assets

When the secretary shall have taken possession of the property and business of any such corporation or person, he shall forthwith give notice in writing of such fact to all corporations and persons holding any assets thereof. No one having such notice or actual knowledge that the secretary has so taken possession shall have a lien or charge against any of the assets of such corporation or person for any charge, payment, advance, or clearance thereafter made or liability thereafter incurred. The status of all parties shall become fixed on the date the secretary files his certificates of possession in his office in Harrisburg, as provided in section twenty-two of this act.[1] (1923, June 15, P. L. 809, § 25; 1927, May 5, P. L. 762, § 9.)

§ 26. Inventory of assets

After the secretary has taken possession as aforesaid, he shall make, or cause to be made, a complete inventory of the assets of such corporation or person, which inventory shall be verified by oath or affirmation of the person or persons making the same, and shall forthwith file such inventory in his office. (1923, June 15, P. L. 809, § 26.)

§ 27. Suspension or continuation of business

The secretary is authorized, upon taking possession of the property and business of such corporation or person, to continue or suspend the business for such period as he may deem necessary to enable him to determine whether to liquidate the affairs of such corporation or person, and, during such period, to take such action as in his judgment is necessary to conserve the assets and business. (1923, June 15, P. L. 809, § 27.)

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[1] Section 22 of this title, ante.

§ 28. Surrender of possession by secretary

The secretary may, upon conditions approved by him, surrender possession for the purpose of permitting such corporation or person to resume business to sell or convey its or his property and franchise, or to merge or consolidate its or his business with that of another corporation or person in accordance with the laws of this Commonwealth, or because he is without funds to continue or liquidate the business and property of which he has taken possession; but he shall not authorize any decrease of capital stock by a corporation except upon compliance by the corporation with the provisions of law as to such decrease.

Whenever the secretary shall surrender possession under the provisions of this section, he shall forthwith issue an order, under his official seal, authorizing such corporation or person to resume business, to sell or convey its or his property and franchises, or to merge or consolidate as aforesaid, and shall file said order in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall thereupon cause the entries upon the judgment index made pursuant to section twenty-two of his act [1] to be satisfied. (1923, June 15, P. L. 809, § 28; 1927, May 5, P. L. 762, § 10.)

§ 29. Status and powers of secretary as receiver

Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the rights, powers, and duties of such corporation or person and with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, whether or not the property of such corporation or person,

[1] Section 22 of this title, ante.

including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the secretary has possession.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors. (1923, June 15; P. L. 809, § 29; 1927, May 5, P. L. 762, § 11.)

§ 30. Power of court to make and enforce orders

The court having jurisdiction shall have power to make and enforce any and all orders necessary and appropriate to enable the secretary to discharge his duties in connection with the business, property, and affairs of any corporation or person taken into possession by the secretary under the provisions of this act, upon petition of the secretary, acting personally or through his duly authorized deputy, setting forth the facts; and the court shall also have the power, upon petition of the secretary, acting personally or through his duly authorized deputy, to order and direct other corporations or persons in possession of assets or property, belonging to the corporation or person in possession of the secretary, to transfer or convey said property or assets to the secretary, and to execute and deliver any and all necessary instruments in writing to accomplish that purpose. (1923, June 15, P. L. 809, § 30; 1927, May 5, P. L. 762, § 12.)

§ 31. Continuance of possession; exceptions

When the secretary shall have duly taken possession of the business and property of corporation or person as provided in section twenty-one of this act,[1] he shall hold such possession until the affairs of such corporation or person have been liquidated by him, unless:

I. He shall have been directed by order of court to surrender such possession pursuant to the provisions of section twenty-three of this act; [2]

II. He shall have permitted a resumption of business, or a sale or conveyance of property and franchises, or a merger or consolidation, pursuant to the provisions of section twenty-eight of this act; [3]

III. The stockholders of such corporation, after payment of all creditors in full, shall have elected a trustee or trustees, to continue the liquidation of such corporation, or the court shall have appointed such trustee or trustees, pursuant to the provisions of section fifty of this act,[4] and such trustee or trustees shall have duly qualified to take possession of the remaining assets of such corporation; or,

IV. The depositors and other creditors of such person and the expenses of such liquidation shall have been paid in full. (1923, June 15, P. L. 809, § 31.)

§ 34. Compromises

The secretary may, with leave of court, compound or compromise any debt, claim, or judgment due to the corporation or person, and discontinue any action or other proceeding pending therefor; if done in good faith and after proper inquiry; and may require all mortgages, conditional contracts, pledges, and liens of or upon any real or personal

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[1] Section 21 of this title, ante.
[2] Section 23 of this title, ante.
[3] Section 28 of this title, ante.
[4] Section 50 of this title, post.

property of such corporation or person, to be satisfied, canceled, or assigned to him, as he may deem best, or he may sell the property subject thereto. (1923, June 15, P. L. 809, § 34; 1927, May 5, P. L. 762, § 15.)

§ 35. Actions and suits

For the purpose of executing any of the powers and performing any of the duties hereby conferred and imposed upon him, the secretary may, in the name of the corporation or person, prosecute and defend any and all actions and proceedings at law, in equity, or otherwise, pending at the time when the secretary takes possession of the business and property of such corporation or person.

He may, by bill of discovery or other legal or equitable proceeding, obtain information of, and sue for and recover, any assets, debts, or damages, which such corporation or person might sue for and recover, or which any of the creditors might make available for the payment of their claims.

He may, at any time while he is in possession of the property and business of a corporation, institute and maintain against the directors, trustees, managers, or officers, any action or proceeding which is vested in such corporation or in the stockholders or creditors thereof.

He shall be liable to suit, in his representative capacity, by any person seeking to recover specific property, if such property could have been recovered as against the creditors of the corporation or person levying an execution thereon. (1923, June 15, P. L. 809, § 35.)

§ 36. Judgments not to be liens; stay of execution

No mechanic's lien shall attach, nor shall any other lien attach, to any of the property or assets of the corporation or person by reason of the entry of any judgment against such corporation or person after the secretary has taken possession of its or his property and business and filed a certificate in his office in the capitol at Harrisburg, as re-

quired by section twenty-two of this act,[1] and so long as such possession continues.

During such time, no execution or attachment shall issue against such corporation or person, nor shall any pending execution or attachment be proceeded with except by special leave of the court. (1923, June 15, P. L. 809, § 36; 1927, May 5, P. L. 762, § 16.)

§ 38. Inventory and appraisement; statement of liabilities

When the secretary has determined to liquidate the affairs of any such corporation or person, he shall forthwith cause an inventory and appraisement of the assets of such corporation or person, under oath or affirmation, to be made in duplicate, by two disinterested appraisers chosen by him, and shall file such inventories and appraisements, one in his office, and the other in the office of the prothonotary; and, for the purpose of enabling the secretary to do so, he or his duly authorized deputy is hereby empowered to call before him, by subpœna, with or without books and papers, and to examine, the corporation or person, or the officer, director, or employés thereof, taken in possession, under oath, or any person who, he or they have reason to believe, has knowledge of other or further assets of the said corporation or person, or any person who, he or they believe, can give information touching the same. Every witness shall be entitled to receive, out of the estate of the corporation or person, the usual witness fee and mileage for this attendance for these purposes. (1923, June 15, P. L. 809, § 38; 1927, May 5, P. L. 762, § 17.)

§ 41. Notice to depositors and creditors

When the secretary shall have determined to liquidate the affairs of such corporation or person, he shall forthwith give written or printed notice to all depositors to produce to him their deposit or pass books for settlement, stating in

[1] Section 22 of this title, ante.

such notice the amount which the books of the corporation or person show to be due to each depositor, subject to outstanding checks, and notifying such depositors that unless a settlement of the deposit or pass books shall show a different amount to be due, or unless a depositor shall, within four months from the date of such notice, make proof, in the matter hereinafter set forth, that the amount due him differs from the amount as shown by the books of the corporation or person, the amount last mentioned will be conclusive as to the amount of the claim of such depositor, subject, as aforesaid, to any outstanding checks.

The secretary shall, at the same time, give written or printed notice to all creditors other than depositors, so far as known to him, to make proof of their claims in the manner hereinafter set forth, within four months from the date of such notice, or be debarred from coming in upon the fund.

He shall also advertise such notices to depositors and other creditors in a newspaper, and in the legal newspaper, if any, designated by rules of court for publication of legal notices in said county, once a week for four successive weeks. (1923, June 15, P. L. 809, § 41.)

§ 42. Proof of claims of creditors

No claim other than the claim of a depositor shall be allowed unless the claimant, or someone for him if he cannot do so, shall, within four months from the date of such notice, furnish to the secretary a statement of his claim, together with a copy of any book entries pertaining thereto, or any note or other writing evidencing the same, verified by an affidavit in substantially the following form:

"I, (name of claimant) do solemnly swear (or affirm) that the above is a true statement of my claim against (name of corporation or person); that there are no credits or allowances against the same except as therein set forth; that I have not directly or indirectly made or entered into any bargain, arrangement, or agreement, express or im-

plied, to take or receive, directly or indirectly, any money, property, or consideration whatever, to or for myself, or to or for any other person, firm, or corporation whatever, other than my dividend as a creditor; and that there is no collateral security for said indebtedness, or any part thereof, held by me or anyone else other than as above set forth."

In case the claimant shall be a partnership or corporation, such affidavit shall be made by a member of the partnership, or by the treasurer or assistant treasurer of the corporation claimant, and the form thereof shall be modified accordingly.

The provisions of this section shall not apply to the claim of cestuis que trust or others to or against trust funds or property in the custody, possession, or control of a corporation or person, possession of whose business and property is taken by the secretary under the provisions of this act. (1923, June 15, P. L. 809, § 42; 1927, May 5, P. L. 762, § 18.)

§ 45. Partial or final account; objections

At the expiration of the time fixed by the notice and advertisement for the presentation of claims prescribed in section forty-one of this act,[1] the secretary may file a partial or final account, consisting of a statement of receipts and expenditures, together with a list of the claims which have been allowed, and, separately, a list of the claims which have been objected to or are disputed, showing, as to all claimants, the names, addresses, and amounts.

If no account is filed within a year from the time when the secretary takes possession, any party interested may petition the court for an order on the secretary requiring the filing of an account.

Any account filed by the secretary shall be duly verified by him under oath or affirmation. Upon the filing thereof, he shall give written or printed notice, to all the depositors

[1] Section 41 of this title, ante.

and other creditors known to him, of such filing, and that, unless objections shall be filed within thirty days from the date thereof, the same will be confirmed absolutely. He shall also, at the same time, advertise such notice in two newspapers once a week for four successive weeks.

During such period of thirty days, any depositor, other creditor, stockholder, or anyone having any interest, may file in the court objections in writing to said account or to the allowance of any of said claims, a copy of which objections shall forthwith be served upon the claimant whose claim is objected to, or his counsel, and upon the secretary, or his counsel, or the special deputy appointed by him in such proceeding. (1923, June 15, P. L. 809, § 45.)

§ 46. Distribution

If at the expiration of said period of thirty days from the filing of the account, no objections shall have been filed thereto, the same shall be confirmed absolutely. In case objections or exceptions are filed to any claim or claims, the account shall be confirmed absolutely as to those claims against which no objections or exceptions have been filed, and a partial or final dividend, as the case may be, shall be declared and paid by the secretary on all claims as to which no objections or exceptions have been filed. In case there shall be any disputed claim or any claim to which objections shall have been duly filed, the dividend shall be calculated as if all claims were valid and approved, and, after deducting and setting apart such portion of the dividend as may be declared on claims, in accordance with the priorities fixed by law, which are disputed or objected to, the balance shall be distributed among the other claims. If all or any of the claims disputed or objected to shall thereafter be determined to be valid, they shall then receive their portions of such dividend in accordance with the priorities fixed by law. If all or any of such claims be determined to be invalid, the portions of such dividend set apart for them

shall be distributed to the valid claims. (1923, June 15, P. L. 809, § 46; 1927, May 5, P. L. 762, § 20.)

§ 47. Conclusiveness of confirmation and distribution; records; final destruction

The confirmation of a partial account and distribution thereunder, as aforesaid, shall be conclusive only as to the fund distributed, and shall not prevent the proof and allowance, out of the fund involved in any subsequent account, of claims not presented in time for allowance out of such previous fund.

The confirmation of a final account and distribution thereunder, after the objections thereto, if any, have been adjudicated as hereinafter provided, shall be conclusive; and shall work and effect a discharge of the secretary and all deputies or their sureties, from all liability in the matter; and the secretary or his successor, except as hereinafter provided in section fifty of this act,[1] is authorized and empowered to destroy all records belonging to the corporation or person in his possession at the expiration of seven years from the date of the absolute confirmation of the final account of the secretary. (1923, June 15, P. L. 809, § 47; 1927, May 5, P. L. 762, § 21.)

§ 48. Hearing and decision of matters in controversy

If there shall be claims disputed or objected to, or if there shall be objection to the account, the court shall itself, without delay, hear and decide the matters in controversy. The court shall fix a time and place for the hearing, of which notice shall be given by the secretary to all depositors and other creditors whose claims have been disallowed by the secretary, or excepted or objected to by other depositors, creditors, or stockholders, as well as to those depositors, creditors, or stockholders, who have objected to the account or to claims allowed in the account. Said notice

[1] Section 50 of this title, post.

shall also set forth that all parties whose claims are disputed or objected to must appear at said time and place and prove their claims or be debarred from coming in upon the fund for distribution. (1923, June 15, P. L. 809, § 48; 1927, May 5, P. L. 762, § 22.)

§ 49. Expenses to be paid out of fund

All assessments, charges, and penalties due to the department by such corporation or person, all expenses of the taking and maintaining possession of the business and property or the continuing of the business by the secretary, and all expenses of liquidation under the provisions of this act, shall first be payable out of the funds of such corporation or person, including the compensation of special deputies, assistants, and others employed by the secretary to assist him in such proceedings; the allowance of all such expenses to be subject to the approval of the court. (1923, June 15, P. L. 809, § 49.)

§ 50. Distribution of balance; liquidating trustees

If, after the filing and confirmation of the final account of the secretary, and the payment of all creditors in full, and the return to stockholders, who have paid to the secretary the amounts demanded pursuant to section thirty-seven of this act,[1] of their pro rata shares of any such amounts not necessary to pay creditors in full, there shall remain a balance in the hands of the secretary, he shall call a meeting of the stockholders by serving written or printed notice upon them at least thirty days before the day fixed for the meeting.

At such meeting, the stockholders shall elect by ballot a trustee or trustees for the purpose of completing the liquidation. A majority of the stock present in person or by proxy shall be necessary to elect. Should the stockholders fail or refuse to elect, the secretary or any stockholder may

[1] Section 37 of this title, ante.

petition the court for the appointment of such trustee or trustees, who, when appointed, shall give bond to the Commonwealth in such amount, with such surety, and on such conditions, as the court may direct.

When such trustee or trustees have been duly elected or appointed as aforesaid, the secretary shall then transfer, convey, and deliver to such trustee or trustees all the assets of the corporation then remaining in his hands. He shall thereupon be discharged from all further liability to such corporation and its creditors, and shall file a certified copy of the proceedings of such stockholders' meeting in his office, and cause a certified copy thereof to be filed in the office of the prothonotary. No powers subject to the supervision of the department shall thereafter be exercised by such corporation, except by permission of the secretary, and after compliance by such corporation with all the requirements of law as to a new corporation desiring to exercise such powers. (1923, June 15, P. L. 809, § 50.)

SUPREME COURT OF THE UNITED STATES.

No. 559.—October Term, 1936.

General Baking Company, Petitioner, *vs.* Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 29, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Acting under Pennsylvania statutes, October 5, 1931, William D. Gordon, Secretary of Banking, (respondent Harr is his successor) closed the Franklin Trust Company, a banking institution in Philadelphia, and took control of its business and assets.

Thereafter in the United States District Court, Eastern District of Pennsylvania, petitioner, a New York corporation, presented a bill against Gordon, setting up an agreement by which it undertook to keep on deposit with the Trust Company a sum specified, and the latter undertook either directly or through correspondent banks to accept deposits of cash, checks, etc., and to forward the proceeds therefrom to petitioner in New York. Also that when closed the Trust Company had in its assets $49,590.17 received under this agreement, and its correspondent banks had on hand deposits likewise acquired amounting to $32,403.26.

The bill prayed for a decree declaring petitioner owner of the $32,403.26 and that a trust existed in its favor in respect of the $49,590.17 deposit; also for general relief. The answer suggested some qualifications of the alleged agreement and denied that there was no adequate remedy at law. Otherwise, the allegations of the bill were generally admitted.

The District Court took jurisdiction of the controversy; held petitioner was not owner of the $32,403.26; also that no ground existed for impressing a trust upon assets because of the $49,590.17 deposit; and dismissed the bill.

The Circuit Court of Appeals concluded the District Court had no jurisdiction and should have dismissed the bill without adjudicating other questions. It accordingly approved the dismissal but directed that the cause be referred to the state court for proper procedure there.

Although entered in September, 1936, the opinion below does not refer to *Commonwealth Trust Company of Pittsburgh, et al.* v. *Bradford, Receiver,* 297 U. S. 613, decided here March 30, 1936. Nothing indicates that this opinion was brought to the Court's attention. The doctrine there approved, we think, is decisive of the issue concerning jurisdiction now presented.

It was error for the Circuit Court of Appeals to hold that the District Court was without jurisdiction of the controversy. It should have passed on issues properly presented upon the appeal.

The questioned decree must be reversed and the matter remanded to the Circuit Court of Appeals for further proceedings.

A true copy.

Test:

Clerk, Supreme Court, U. S.